DOCKET

No. 87-59-CFX
Status: DECIDED

Title: United States Postal Service, Petitioner
v.
National Association of Letter Carriers, AFL-CIO

Docketed:
July 8, 1987

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Secular,Keith E.

NOTE* Stay granted by CJ on 5/21/87 with chambers opinion

Entry	Date	Note	Proceedings and Orders
2	May 12 1987		Application for Recall and Stay filed (A-820). Response requested on May 14, 1987 due 5/18/87 by Rehnquist, CJ.
3	May 18 1987		Response filed to above application.
4	May 21 1987		Above application granted by Rehnquist, C.J., on May 21,1987, with order and in-chambers opinion
1	Jul 8 1987	G	Petition for writ of certiorari filed.
6	Jul 21 1987		Order extending time to file response to petition until September 1, 1987.
8	Sep 1 1987	X	Memorandum of respondent Natl. Assn. of Letter Carriers filed.
7	Sep 2 1987		DISTRIBUTED. September 28, 1987
9	Nov 30 1987		REDISTRIBUTED. December 4, 1987
12	Dec 7 1987		REDISTRIBUTED. December 11, 1987
13	Dec 14 1987		Petition GRANTED.
			**********
14	Jan 5 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
15	Jan 19 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
16	Jan 28 1988		Brief of petitioner US Postal Service filed.
18	Feb 10 1988		Order extending time to file brief of respondent on the merits until March 8, 1988.
19	Mar 8 1988		Lodgings received. (10 copies).
21	Mar 8 1988		Brief of respondent National Assn. of Letter Carriers, AFL-CIO filed.
22	Mar 8 1988		Brief amicus curiae of AFL-CIO filed.
23	Mar 8 1988		Brief amicus curiae of National Council on Compulsive Gambling, Inc. filed.
20	Mar 9 1988		Lodging received.
25	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 20, 1988. (1st case).
24	Mar 14 1988		Record filed.
		*	Certified copy of original record received.
26	Mar 25 1988		CIRCULATED.
27	Apr 7 1988	X	Reply brief of petitioner US Postal Service filed.
28	Apr 20 1988		ARGUED.
29	Apr 27 1988		Writ of certiorari DISMISSED as improvidently granted.

PETITION FOR WRIT OF CERTIORARI

87 59

No.

Supreme Court, U.S.
FILED
JUL 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE, PETITIONER

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether judicial enforcement of an arbitration award against a public employer may be contrary to public policy where the agency has reasonably determined that the award threatens its basic statutorily defined public mission, although the award does not violate a specific command of positive law or compel unlawful conduct.

2. Whether an arbitration award ordering the Postal Service to reinstate an employee who has been discharged for, and criminally convicted of, failing to deliver thousands of pieces of mail should be set aside as contrary to public policy.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

UNITED STATES POSTAL SERVICE, PETITIONER

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 810 F.2d 1239. The opinion of the district court (App., *infra*, 7a-13a) is reported at 631 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a-26a) was entered on February 13, 1987. A petition for rehearing was denied on April 9, 1987 (App., *infra*, 27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(a) of Title 39, United States Code, provides in pertinent part:

> The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States * * *. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas * * *.

Section 101(e) provides:

> In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

Section 202(a) provides in pertinent part:

> The exercise of the power of the Postal Service shall be directed by a Board of Governors * * *.

Section 402 provides in pertinent part:

> [T]he Board may delegate the authority vested in it to the Postmaster General under such terms * * * as it deems desirable. The Board may establish such committees of the Board, and delegate such powers to any committee, as the Board determines appropriate to carry out its functions and duties. Delegations to the Postmaster General or committees shall be consistent with other provisions of this title, shall not relieve the Board of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment.

Section 403 provides in pertinent part:

> (a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services * * *. The Postal Service shall serve as nearly as practicable the entire population of the United States.
>
> (b) It shall be the responsibility of the Postal Service—(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide; * * *.

Section 1001(e) provides in pertinent part:

> The Postal Service shall have the right, consistent with section 1003 and chapter 12 of this title and applicable laws, regulations, and collective-bargaining agreements—
>
> * * * * *
>
> (2) to hire, promote, transfer, assign, and retain officers and employees in positions within the Postal Service, and to suspend, demote, discharge, or take other disciplinary action against such officers and employees;
>
> (3) to relieve officers and employees from duties because of lack of work or for other legitimate reasons;
>
> (4) to maintain the efficiency of the operations entrusted to it; * * *.

Section 1206(b) provides in pertinent part:

> Collective-bargaining agreements between the Postal Service and bargaining representatives * * * may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration * * *.

Section 1208(b) provides in pertinent part:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

Section 1209(a) provides:

> Employee-management relations shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of subchapter II of chapter 7 of title 29 [29 U.S.C. (& Supp. III) 151-169 (National Labor Relations Act)].

STATEMENT

Like *United Paperworkers Int'l Union* v. *Misco, Inc.*, cert. granted, No. 86-651 (Jan. 12, 1987), this case involves the question whether considerations of public policy may preclude enforcement of a labor arbitrator's reinstatement order (see *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. 757, 766 (1983)). Here, however, the order runs against a public employer, the Postal Service, charged by statute with the obligation promptly, reliably, and efficiently to carry out its mission—the delivery of the mails (39 U.S.C. 101, 403, 1001). The arbitration award directs the Postal Service to reinstate a letter carrier who was discharged for, and criminally convicted of, failing to deliver more than 3,500 pieces of mail. The court of appeals nevertheless held that enforcement of the award does not violate public policy (App., *infra*, 1a-6a).

1. In 1984 police and postal inspectors made a lawful search of the personal automobile of letter carrier Edward Hyde. They found more than 3,500 undelivered pieces of mail addressed to residents on his delivery route and elsewhere. Some of the mail contained commercial and United States Treasury checks; some had been delayed more than a year. See App., *infra*, 8a. Mr. Hyde pled guilty to unlawful delay of the mail by a postal employee, in violation of 18 U.S.C. 1703, and was sentenced to 18 months' probation, a condition of which was that he complete a rehabilitation program for compulsive gamblers (App., *infra*, 8a).

The Postal Service discharged Mr. Hyde for his criminal dereliction of duty. The National Association of Letters Carriers filed a grievance on Mr. Hyde's behalf and ultimately sought arbitration. The arbitrator ordered reinstatement of Mr. Hyde without back pay after a 60-day medical leave of absence. App., *infra*, 8a-9a. Although stating that the question presented was whether Mr. Hyde's removal was for "just cause," the arbitrator refused to consider Mr. Hyde's unlawful possession and delay of mail in themselves sufficient. Rather, while acknowledging that he was unable to foretell the prospects of Mr. Hyde's rehabilitation (*ibid.*), that "[t]here is the threat of recurrence of misconduct" (*id.* at 23a), and that he was not persuaded that Mr. Hyde could yet return to work (*ibid.*), the arbitrator ordered Mr. Hyde's reinstatement (after 60 days) because he thought reinstatement was necessary to Mr. Hyde's rehabilitation. The arbitrator explained: "if any reasonable hope exists for the rehabilitation of * * * [Mr. Hyde] and the returning of him to the work place, no one should deny him this opportunity" (*id.* at 21a).

2. The Postal Service filed suit in the district court seeking to set aside the award as contrary to

public policy (see *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 766). The district court agreed with the Service (App., *infra*, 7a-13a; 631 F. Supp. 599, 600 (D.D.C. 1986)). Following the First Circuit decision in *United States Postal Service* v. *American Postal Workers Union*, 736 F.2d 822 (1984) (enforcement of arbitrator's order to reinstate a postal employee who admitted embezzling postal funds violates public policy), the district court concluded (App., *infra*, 12a) that the award ordering reinstatement of Mr. Hyde violates the public policy requiring a reliable and efficient postal service. The court noted that it would "not lightly discard the compassionate conclusions of the arbitrator" (*ibid.*), but explained (*id.* at 11a-12a (emphasis in original; footnote omitted)) that Mr. Hyde

> violated a public trust by failing to perform his own primary duty, viz., properly delivering the mail entrusted to him, and his conduct does no less mischief to the operation of the postal system simply because it originates in deficits of character arguably more forgiveable than cupidity. The inexorability of the mails, upon which literally millions depend daily, is equally compromised whether postal workers are derelict in their duties for reasons of avarice, indolence, or distractive vices such as gambling. The public policy which must prevail in such cases, when a choice must be made, is that which gives best assurance of an efficient and reliable postal service, and that policy is *not* one of deference to arbitral autonomy in individual grievance cases, no matter how conscientiously the arbitrator may have sought to match the penalty to the culpability of the offender. The Postal Service must retain the ability to remove postal employees it does not fully trust from positions vulnerable to breaches of trust; the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabilitation of a single letter carrier.

3. The court of appeals reversed (App., *infra*, 6a; 810 F.2d 1239 (1987)). The court had previously held, in *Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 808 F.2d 76 (D.C. Cir. 1987), petition for cert. pending, No. 86-1548 (filed Mar. 26, 1987), and in *American Postal Workers Union* v. *United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), that an arbitrator's award may be set aside as contrary to public policy only if the award itself violates established law or seeks to compel unlawful conduct. The court reaffirmed that view in this case (App., *infra*, 3a-5a), though it acknowledged (*id.* at 12a n.4) that its approach was in conflict with that of the First Circuit in *United States Postal Service* v. *American Postal Workers Union*, *supra*. On the particular facts of this case, the court found no legal proscription against the reinstatement of Mr. Hyde (App., *infra*, 5a-6a) and accordingly remanded with instructions to enforce the arbitration award.

On April 9, 1987, the court denied the government's petition for rehearing (App., *infra*, 27a). On April 24, the court refused to stay issuance of its mandate (App., *infra*, 28a). On May 21, 1987, Chief Justice Rehnquist, acting as Circuit Justice, granted the government's application for a stay (App., *infra*, 29a-31a).

REASONS FOR GRANTING THE PETITION

The court of appeals erred in both its interpretation and its application of the principle that federal courts must refuse to enforce arbitration awards that are against public policy. The courts of appeals are

in sharp conflict over the scope of that principle not only as it applies to private employers but also as it applies to public employers (and, in particular, the Postal Service). The narrow view of the principle espoused by the court of appeals in this case, whatever its merits in the private-employer context, is erroneous as applied to public employers, like the Postal Service, that are subject to statutorily defined public duties. The arbitration award here, which ordered the Postal Service to reinstate an employee who criminally failed to deliver thousands of pieces of mail, must be set aside because it is inconsistent with the Service's statutory responsibility and authority to carry out its fundamental mission.

1. This case presents an important question regarding the scope and application of the rule that a court may, indeed must, set aside an arbitration award rendered under a collective bargaining agreement when its judicial enforcement would be contrary to public policy. See *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 766 (if a labor contract as interpreted by an arbitrator "violates some explicit public policy, we are obliged to refrain from enforcing it"); *Town of Newton* v. *Rumery*, No. 85-1449 (Mar. 9, 1987), slip op. 4 (footnote omitted) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement"). The court of appeals interpreted this public policy doctrine as permitting a court to set aside an arbitration award, in public-employer cases and private-employer cases alike, only when the award compels unlawful conduct or when its enforcement would violate specific positive law. As applied to private employers, there is a conflict among the courts of

appeals on whether the doctrine is restricted to specific positive-law violations. *E.g.*, *Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l*, *supra*; *E.I. DuPont de Nemours & Co.* v. *Grasselli Employers Independent Ass'n*, 790 F.2d 611 (7th Cir. 1986) (disagreeing with view of District of Columbia Circuit), cert. denied, No. 86-184 (Oct. 6, 1986); *S.D. Warren Co.* v. *United Paperworkers' Int'l Union*, 815 F.2d 178 (1st Cir. 1987) (same); *Amalgamated Meat Cutters, Local 540* v. *Great Western Food Co.*, 712 F.2d 122, 124 (5th Cir. 1983) (same). This Court has granted the petition for a writ of certiorari in *United Paperworkers Int'l Union* v. *Misco, Inc.*, *supra*, which presents the question, in a private-employer case, whether the restrictive view is correct.

We do not here take a position on the proper scope of the public policy principle as applied in *Misco* or in other private-employer settings, although some of the reasons (set out below) why we submit that the District of Columbia Circuit's narrow view is wrong in this public-employer case apply as well in certain private-employer cases. It is clear in any event that should this Court reject the restrictive view of the public policy doctrine in *Misco*, the decision of the court of appeals in this case could not stand. At the very least, the decision would have to be vacated and the public policy question reconsidered. Accordingly, at a minimum, the instant petition should be held for *Misco*.

2. The decision of the court of appeals in this case warrants review independent of *Misco*. In *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 766 (citation omitted), this Court stated that, when the public policy doctrine is invoked, the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal

precedents and not from general considerations of supposed public interest.'" Wholly apart from whether *Misco* or other private-employer cases may involve such a policy, this case clearly involves a public policy of the sort called for by *W.R. Grace*, and that is so for a reason not present in *Misco*—the presence of statutory commands defining the mission and standards of operation of a public employer.

Petitioner here, the Postal Service, is a public employer with a public mission defined by statute. The Service "shall provide prompt, reliable, and efficient services" in delivering the mail (39 U.S.C. 101(a); see also 39 U.S.C. 101(e), 403(a) and (b)(1), 1001 (e)(2), (3), and (4)). This statutorily rooted public obligation is enjoined upon the Postal Service, and the Service is not free to relinquish it. Moreover, this fundamental obligation to safeguard and to deliver the mails is necessarily implicated by any Postal Service action, including compliance with an arbitral reinstatement order, that threatens to undermine its mission. By contrast, private employers like the one involved in *Misco* do not ordinarily operate under a statutorily based public obligation that guides and constrains the exercise of their discretion in the conduct of their business.

For this reason, the scope of the public policy doctrine as applied to public-sector employers like the Postal Service raises a question distinct from the private-sector issue presented in *Misco*. Because statute-based public policy constraints are more demanding and more focused and explicit, the discretion of the Service to conclude that compliance with a particular award would be inconsistent with those constraints, and the role of judicial review of arbitration awards for consistency with public policy, must be

correspondingly greater. Accordingly, as we explain more fully below, even if the Court were to adopt a restrictive view of the public policy doctrine in the *Misco* context, a different result would be called for here. See App., *infra*, 30a (opinion of Rehnquist, Circuit Justice, on Application for Stay) ("Although [*Misco*] presents the issue in the context of a private employer, [petitioner] presents a stronger case for setting aside the arbitrator's award because it operates under a statutory mandate to ensure prompt delivery of the mails. See 39 U.S.C. § 101(a).").

The conflict among the courts of appeals on the private-sector issue is mirrored in the public-sector setting. Indeed, the courts of appeals are pointedly in conflict on the particular issue presented in this case —the scope of the public policy doctrine as applied to the Postal Service. Compare App., *infra*, 1a-6a (decision below) with *United States Postal Service* v. *American Postal Workers Union, supra* (1st Cir.). In addition, the issue here is of obvious importance to the federal government generally, since the Postal Service's statutorily rooted public mission has parallels throughout the government, as does arbitration under public sector collective bargaining agreements (see 5 U.S.C. 7121). Therefore, regardless of the decision in *Misco*, the court of appeals' decision in this case merits review.

3. In a public sector case like this, even if not in a private sector case like *Misco*, the court of appeals' restrictive view of the public policy doctrine is erroneous. The court of appeals simply concluded that, because the hiring of Mr. Hyde would not be clearly proscribed by positive law, no statutorily rooted public policy is violated by enforcing the arbitrator's award ordering his reinstatement. In reaching that

conclusion, the court of appeals ignored the statutorily mandated public policy demanding a reliable and efficient Postal Service, a policy that plainly meets the *W.R. Grace* requirement (461 U.S. at 766 (citation omitted)) that it be "well defined and dominant, and * * * ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

a. Title 39 of the United States Code provides the statutory framework within which this case arises. The Postal Service is authorized by Section 1209(a) to enter into collective bargaining agreements and by Section 1206(b) to provide in such agreements for arbitration as a means of resolving grievances. The resulting grievance arbitration awards are, in turn, enforceable in court to the extent provided by Section 1208(b). That provision, however, like Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185, which applies generally in the private sector, does not define the substantive law governing when and how collective bargaining agreements (and hence arbitration awards) are to be enforced. Instead, it authorizes the federal courts to develop common-law principles to apply in exercising jurisdiction over "[s]uits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees" (39 U.S.C. 1208(b)). See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (construing 29 U.S.C. 185 as authorizing such development).

In fulfilling the obligation to develop substantive law governing the enforcement of Postal Service labor contracts generally and arbitration awards in particular, the federal courts should not automatically and uncritically transfer to this special context

every aspect of the law developed under Section 301 of the LMRA, which does not apply to the Postal Service.[1] Although the principles developed in that private-sector setting may certainly be borrowed, and indeed uniformity is generally desirable,[2] the federal courts must define Postal Service labor arbitration principles in light of the distinctive statutory structure defining the duties of the Postal Service. The court of appeals in this case wholly ignored that obligation.

b. The scope of public policy review of Postal Service arbitration awards under Section 1208(b) must be defined with reference to the statutes, cited above, that define the Postal Service's public mission. That mission is subject to implementation—but not subject to dilution—by a collective bargaining agreement or an arbitrator's decision under such an agreement. Hence, although the Service is permitted to adopt arbitration as part of its ordinary means of resolving employee grievances (39 U.S.C. 1206(b)),

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[1]Section 1209(b) (39 U.S.C.) generally applies Sections 151 through 169 of Title 29 (National Labor Relations Act) to the Postal Service. The incorporated provisions, however, do not include Section 301 of the LMRA, which is codified at 29 U.S.C. 185. Moreover, the incorporation of the specified Title 29 provisions is only "to the extent not inconsistent with provisions" of the Postal Service statute (39 U.S.C. 1209(b)).

[2] See, *e.g.*, *Bowen* v. *United States Postal Service*, 459 U.S. 212 (1983) (borrowing Section 301 law to hold Postal Service union liable for certain damages for breach of duty of fair representation); *Johnson* v. *United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985) (Section 301 law provides "guidance"); *Abernathy* v. *United States Postal Service*, 740 F.2d 612, 614 (8th Cir. 1984); *Melendy* v. *United States Postal Service*, 589 F.2d 256 (7th Cir. 1978); *Malone* v. *United States Postal Service*, 526 F.2d 1099, 1109-1110 (6th Cir. 1975).

that authority does not allow the Service to waive its statutory obligation to fulfill its public duties. Nor may the Postal Service divest itself of the discretion plainly required to determine how to carry out the broad statutory responsibilities with which Congress has vested the Postal Service.[3]

The two statutorily based policies that are relevant here—one promoting the finality of arbitration when it is selected by the Service, the other requiring the public employer to retain the authority to carry out its public responsibilities—are in tension in some instances. The resolution of the tension between the two statutory policies, like any accommodation of two competing but partly overlapping statutes, is a task for the courts. But the judicial responsibility is to accommodate both of the competing statutory policies, not to permit one simply to displace the other, even if the courts generally resolve the tension by holding the Service to its arbitration commitment as itself a reasonable interpretation of its statutory mandate. In some extreme instances, an arbitral award would effectively overturn the congressional commitment of administrative discretion to the Postal Service to determine how to carry out its basic

[3] Congress has conferred authority and discretion over postal operations on the *Postal Service* (39 U.S.C. 403(a)). Congress specifically entrusted the Board of Governors with the obligation to direct "[t]he exercise of the power of the Postal Service" (39 U.S.C. (Supp. III) 202(a)). Although Congress permitted the Board to delegate its authority to the Postmaster General or to Board committees (39 U.S.C. 402), it did not provide for further delegation. Indeed, Congress expressly provided that such delegations "shall not relieve the Board of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment" (39 U.S.C. 402).

mission. Accordingly, the federal courts must decline to enforce arbitration awards that the Postal Service reasonably determines to threaten its fundamental obligation to provide reliable and efficient mail delivery.[4]

c. The aspects of arbitration under collective bargaining agreements that distinguish the Postal Service from most private employers are shared by public employers generally. Thus, while the statutory source of judicial authority to review labor arbitration awards in most private-sector cases is Section 301 of the LMRA, 29 U.S.C. 185, that statute does not apply to the Postal Service, which is governed by 39 U.S.C. 1208(b), or to federal employers generally, which are governed by 5 U.S.C. (& Supp. III) 7121-7123. Moreover, public employers but not private employers generally have a statutorily defined public mis-

[4] Of course, even in the public-sector setting, courts must accord arbitrators' findings and conclusions substantial deference and must apply the public policy doctrine with care so as not to undermine the system of ordinarily final arbitration. "Incantations of 'public policy' may not be advanced to overturn every arbitration award that impairs the flexibility of management * * *. Only when the award contravenes a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility, may it be set aside" (*Port Jefferson Station Teachers Ass'n* v. *Brookhaven-Comsewogue Union Free School Dist.*, 45 N.Y.2d 898, 899, 383 N.E.2d 553, 554, 411 N.Y.S.2d 1, 2 (1978)). Moreover, the importance to public employers of maintaining a mutually beneficial working relationship with their employees' labor unions provides a strong disincentive against public employers' too-frequent invocation of the public policy doctrine to challenge arbitration awards. Although the Postal Service is annually involved in thousands of grievance arbitrations, it has challenged only a handful under the public policy doctrine each year.

sion akin to that of the Postal Service. Because such a mission and other statutory duties necessarily affect the scope of judicial review of arbitration awards, the significant distinction between public and private employers for this purpose is widely recognized. See Craver, *The Judicial Enforcement of Public Sector Grievance Arbitration*, 58 Tex. L. Rev. 329, 338-339, 350-352 (1980); *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1684-1687, 1691-1696, 1718-1724 (1984).

Further, although arbitration in the Postal Service bears strong resemblances to private-sector arbitration, there are also important differences. For example, unlike their ordinary private-sector counterparts, Postal Service (and other federal government) employees have no right to strike (5 U.S.C. 3333, 7311; 39 U.S.C. 410); thus, the alternative to arbitral finality is not the stark economic warfare that is more typical of the private sector (see *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377-379 (1974)). Moreover, as explained above, more than mere contractual obligations are relevant to a Postal Service arbitration. An arbitrator who is applying only contractual provisions between private parties has broad leeway to fill in and to elaborate those provisions according to the "common law of the shop" (*United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); see also *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. at 377-379). When statutory duties of a public employer overlay any contractual agreements, the contract and the law of the shop cannot always be the last word. Rather, those public duties must also be considered. To do so, of course, requires administrative and, then, judicial interpretation: the meaning in a given case of the

Postal Service's public mission, like any question of public policy, "is ultimately one for resolution by the courts" (*W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 766).

d. Not only the Postal Service statute itself but also the legislative history of that statute reveals congressional recognition of the distinctive character of Postal Service collective bargaining (and hence arbitration under collective bargaining agreements). Thus, although Congress took private-sector labor relations as the model for the Postal Service (see H.R. Rep. 91-1104, 91st Cong., 2d Sess. 13 (1970)), it was understood from the beginning of the legislative process that it was only "in general" that the private-sector rules were to be borrowed for the Postal Service (*id.* at 13, 57). Indeed, Congress specifically recognized that "[c]ollective bargaining in public employment involves factors that differ importantly from those traditionally found in the private sector" (*id.* at 14).

In short, whatever the scope of "public policy" review of arbitration awards in various private-sector cases, the public policy doctrine as applied to the Postal Service (and other public employers with statutorily rooted public duties) requires that courts review claims by the Service that fulfillment of its fundamental statutorily based public trust would be threatened by enforcement of a particular arbitration award.[5] The court of appeals wholly failed to consider this question.

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[5] A similar conclusion may apply to some private employers that are subject to statutory duties. In *Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n Int'l*, 808 F.2d 76 (D.C. Cir. 1987), petition for cert. pending, No. 86-1548 (filed Mar. 26, 1987), the petitioner has argued that, as an air carrier, it is subject to such overriding statutory duties.

4. The court of appeals erred not only in refusing to undertake the proper analysis. The result it reached is also erroneous. We think there can be only one conclusion of a proper analysis of this case—that the arbitration award at issue here violates public policy.

This case involves a simple determination by the Postal Service that an employee who commits an offense that effects an egregious impairment of the fundamental duty of the Postal Service—to deliver the mails—must be discharged. Mr. Hyde failed over the course of a year to deliver more than 3,500 pieces of mail, including Treasury checks, on which numerous individuals may vitally depend. Whatever the prospects for rehabilitation of Mr. Hyde in particular, the Service has determined that, for the sake of its mission as a whole, it cannot have in its employment an individual who has committed such an offense against the Service; nor can it place its patrons at risk by restoring Mr. Hyde to his position of public trust. Enforcement of the arbitration award ordering Mr. Hyde's reinstatement would, by example to his co-workers and as a precedent, "seriously impair [the Postal Service's] ability to impress the seriousness of the Postal Service's mission upon its workers" and hence would deprive the Service of its "ability to carry out its legal obligations" (App., *infra*, 30a-31a (opinion of Rehnquist, Circuit Justice, on Application for Stay).

As the district court stated (App., *infra*, 12a (footnote omitted)), "[t]he Postal Service must retain the ability to remove postal employees it does not fully trust from positions vulnerable to breaches of trust; the mails are simply too important to the country to make them dependent upon the vicissitudes of re-

habilitation of a single letter carrier." In this case, a general policy of deference to arbitral awards cannot override the need, as the Postal Service determines it in the exercise of its delegated responsibility, to protect the basic public mission of the Postal Service. The arbitration award rejecting the Service's determination of how to fulfill its public obligations in this case should therefore be set aside.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to hold this petition pending its decision in *United Paperworkers Int'l Union* v. *Misco, Inc.*, cert. granted, No. 86-651 (Jan. 12, 1987), and dispose of this petition as appropriate in light of that decision.

Respectfully submitted.

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JULY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5296

UNITED STATES POSTAL SERVICE

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 85-02206)

Filed February 13, 1987

Before: MIKVA, EDWARDS and WILLIAMS, *Circuit Judges.*

Opinion for the Court PER CURIAM.

PER CURIAM: In this case, we review a decision by the District Court, *see United States Postal Serv. v. National Ass'n of Letter Carriers*, 631 F. Supp. 599 (D.D.C. 1986), vacating an arbitrator's award on the ground that the award violated public policy. The District Court's opinion was issued fourteen days

prior to our decision in *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986) (*"Postal Workers"*), and before our most recent pronouncement on the "public policy exception" in *Northwest Airlines v. Air Line Pilots Association*, No. 85-6228, slip op. (D.C. Cir. Jan. 6, 1987). Because the District Court's decision is inconsistent with the holdings in these two cases, we reverse.

I. Background

The United States Postal Service (the "Postal Service") and the National Association of Letter Carriers, AFL-CIO (the "Union") are parties to a collective bargaining agreement. Article 16 Section 1 of that agreement provides that no employee may be disciplined or discharged except for "just cause." [1] Any disciplinary action taken by the Postal Service may be challenged in accordance with the agreement's grievance-arbitration procedures. The agreement further provides that discipline should be "corrective" in nature rather than "punitive." [2]

Edward Hyde, a letter carrier employed by the Postal Service, was discharged from his employment shortly after being arrested and charged with unlawful delay of the mail. Hyde subsequently pled guilty and was sentenced to eighteen months probation, the principal condition being that he enroll in and successfully complete a rehabilitation program for compulsive gambling.

The Union, pursuant to the parties' agreement, filed a grievance challenging Hyde's dismissal. When

[1] *See* Agreement, *reprinted in* Joint Appendix ("J.A.") at 45.

[2] *Id.*

the parties were unable to settle the grievance, the Union submitted the matter to arbitration. The specific issue posed for the arbitrator was whether Hyde's discharge had been for "just cause" under the parties' collective bargaining agreement. After considering this issue, the arbitrator ordered that Hyde be reinstated without back pay upon fulfilling certain conditions.[3] Although Hyde satisfied the conditions established by the arbitrator, the Postal Service refused to reinstate him. Instead, it filed an action in the District Court seeking to vacate the arbitrator's award on the sole ground that the award violated public policy.

Relying principally on the First Circuit's decision in *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984) (vacating an arbitrator's award that reinstated a window clerk convicted of embezzling postal funds), the District Court vacated the arbitrator's award. Although the trial court acknowledged the strong federal policy of deference to arbitral awards, it concluded that this policy had to give way to one "which gives best assurance of an efficient and reliable postal service." 631 F. Supp. at 601. The Union filed this appeal from the District Court's judgment.

II. Analysis

As noted earlier, the District Court's decision was rendered without the benefit of our two recent pronouncements in *Postal Workers* and *Northwest Air-*

[3] Specifically, Hyde was to be reinstated upon demonstrating, after a 60-day medical leave, that he had attended Gamblers Anonymous meetings regularly, had fully cooperated with its members, had not participated in any gambling and was physically able to return to work. *See* J.A. at 26.

lines. It is clear, however, that *Postal Workers* and *Northwest Airlines* compel reversal of the District Court's judgment.

As we stated most recently in *Northwest Airlines*, slip op. at 3, "a labor arbitration award must be enforced if the arbitrator acts within the confines of his jurisdiction and his award draws its essence from the parties' collective bargaining agreement; this is so even when a reviewing court disagrees with the arbitrator's judgment on the merits." In the instant case, the Postal Service does not (indeed, cannot) maintain that the arbitrator acted outside the bounds of the parties' collective bargaining agreement. Rather, the facts make clear that the arbitrator performed the very role contemplated by the parties to that agreement; he interpreted the contract in order to decide whether Hyde had been discharged for "just cause." The arbitrator's judgment on this issue was precisely what the parties had bargained for.

This court has recognized that an arbitration award may be set aside as violative of public policy in certain "limited circumstances." *Northwest Airlines*, slip op. at 3. We made abundantly clear in *Postal Workers* (and again in *Northwest Airlines*), however, that the "public policy exception" is extremely narrow:

> [I]t is well-understood that courts will not enforce an arbitration award if the award itself violates established law or seeks to compel some unlawful action. However, this rule, which is sometimes referred to as a public policy exception, is *extremely narrow.* In *W.R. Grace,* [461 U.S. 757, 766 (1983)] the Supreme Court has explained that, in order to provide the basis for

> an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of "public policy."
>
> . . . [I]t is plain from the language in *W.R. Grace* itself that the Court meant to say only that an arbitration award may not be enforced if it transgresses "well defined" and "dominant" "laws and legal precedents." It is also clear from the opinion in *W.R. Grace* that judges have no license to impose their own brand of justice in determining applicable public policy; thus, the exception applies only when the public policy emanates from clear statutory or case law, "*not from general considerations of supposed public interests.*"
>
> There is surely no doubt that the instant case does not pose a situation requiring the invocation of a public policy exception. The arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct.

Postal Workers, 789 F.2d at 8 (emphasis in original) (footnotes omitted).

In this case, there is again no basis for invoking the "extremely narrow" public policy exception. The Postal Service cannot identify any "legal proscription against the reinstatement of a person such as

[Hyde]." Rather, the Postal Service would have this court "impose [its] own brand of justice" by holding that the reinstatement of Hyde is inconsistent with the public's interest in an efficient and reliable postal service. We declined a similar invitation in *Postal Workers* and *Northwest Airlines*, and we decline the invitation once again.[4]

III. Conclusion

For the reasons set forth above, the judgment of the District Court is reversed. The case is remanded to the trial court with instructions to enter judgment for the appellant.

So ordered.

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[4] We recognize that our holding may differ from the position taken by the First Circuit in *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984). However, we observed in *Postal Workers*, 789 F.2d at 9, that it was "difficult to square either the rationale or the result" in the First Circuit case with the Supreme Court's decision in *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757 (1983); *see also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In the instant case, we must once again reject the First Circuit's approach to the extent that it is inconsistent with Supreme Court precedent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 85-2206

UNITED STATES POSTAL SERVICE, PLAINTIFF

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, DEFENDANT

April 4, 1986

MEMORANDUM AND ORDER

JACKSON, District Judge.

This labor case is before the Court on the parties' cross-motions for summary judgment.[1] Plaintiff United States Postal Service ("Postal Service") seeks to vacate an arbitrator's decision ordering the reinstatement of a letter carrier convicted of unlawfully delaying the mail on the ground that such an award is contrary to public policy. Defendant National Association of Letter Carriers, AFL-CIO ("Union"), urges that another public policy—judicial deference to arbitral determinations—mandates

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[1] Jurisdiction is conferred by 39 U.S.C. §§ 409(a), 1206(b) and (d), and 9 U.S.C. § 10.

affirmance of the order. The material facts are not in dispute and, for the reasons set forth below, the Court will grant plaintiff's motion for summary judgment and deny that of defendant.

On June 13, 1984, police and postal inspectors made a lawful search of the impounded personal automobile of letter carrier Edward Hyde. They found over 3,500 undelivered pieces of mail addressed to residents on Hyde's delivery route in Garden City, New York, and a lesser amount destined for addresses elsewhere. Most of the mail was first-class, some containing commercial and U.S. Treasury checks. Postmarks indicated certain items had been more than a year delayed.

Hyde was immediately arrested and charged with unauthorized possession and unlawful delay of the mail. After Hyde pled guilty to the latter offense,[2] the court sentenced him to 18 months' probation, the principal condition of which being that he enroll in and successfully complete a rehabilitation program for compulsive gamblers. Hyde has sworn under oath that he regularly attends Gamblers Anonymous meetings and abstains altogether from gambling.

Shortly after Hyde's arrest, the Postal Service notified Hyde of its intention to discharge him, effective August 20, 1984. During the notice period, the Union filed a grievance on Hyde's behalf pursuant to the collective bargaining agreement, maintaining that there was not "just cause" for the firing. Unable to settle the grievances, the Union sought arbitration, and on April 12, 1985, the arbitrator ordered that Hyde be given a medical leave of absence of 60 days and then reinstated without back pay. Ac-

[2] 18 U.S.C. § 1703(b).

knowledging his inability "to foretell what the future prospects of the Grievant's rehabilitation may yield," the arbitrator nevertheless concluded that, "if any reasonable hope exists for the rehabilitation of the Grievant[, it is in] returning . . . him to the work place, [and] no one should deny him this opportunity." The Postal Service, however, has refused to comply and has instead filed the instant complaint to vacate the arbitration award.

The only issue before the Court is whether the award violates public policy and, therefore, exceeds the scope of the arbitrator's authority. It is, of course, a most basic principle of labor law that the strong federal policy favoring arbitration of labor disputes results in "extremely limited" judicial review of arbitrators' awards. *Devine v. White*, 697 F.2d 421, 436 (D.C. Cir. 1983) (citing *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). The parties having bargained for an arbitrator's interpretation of the collective bargaining agreement, courts are bound to enforce the awards "[u]nless the arbitral decision does not 'dra[w] its essence from the collective bargaining agreement. . . .'" *W.R. Grace and Co. v. Local 759, International Union of Rubber Workers*, 461 U.S. 757, 764, 103 S.Ct. 2177, 2182, 76 L.Ed.2d 298 (1983) (quoting *Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361).

Qualifying this general rule of judicial deference, however, is an exception which operates when an arbitrator's decision contravenes the law or some other public policy of comparable stature. The court of appeals for this circuit has stated that, while "an arbitral decision . . . must present egregious deviations from the norm before we will abandon the

firmly-established principle of deference[,] courts will not enforce an award that is contrary to law or explicit public policy." *Office and Professional Employees International Union, Local 2 v. WMATA*, 724 F.2d 133, 137, 140 (D.C.Cir. 1983). *See also Revere Copper and Brass Inc. v. Overseas Private Investment Corp.*, 628 F.2d 81, 83 (D.C.Cir.), *cert. denied* 446 U.S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (1980). To override the rule of deference, however, the competing public policy " 'must be well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.' " *Id.* at 140 (citing *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2783).

The First Circuit has held just such a public policy to apply in circumstances sufficiently similar to govern in this case. *See United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir.1984). Holding an arbitration award requiring the Postal Service to reinstate a window clerk convicted of embezzling postal funds to be unenforceable, the court declared that the public policy involved was "not only defined by positive law, but . . . also the clear dictates of common sense[:]"

> A postal employee is required to swear that he "will well and faithfully discharge the duties of the office on which [he is] about to enter." 39 U.S.C. § 1011. Numerous statutes relate to the conduct and honesty of postal employees—among them is 18 U.S.C. § 500, the statute under which [the clerk] was convicted. Moreover, the Postal Service is required by law to be "prompt, reliable, and efficient. . . ." 39 U.S.C. § 101(a). Finally, as a government monopoly, the public has to use the Postal Service for the carriage of regular letter mail.
>
> Aside from any considerations bearing directly on [the clerk], we cannot avoid the common sense implications that requiring the rehiring of [the clerk] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.

Id. at 825.[3]

The Union contends that the First Circuit case is distinguishable because the window clerk, unlike Hyde, committed a crime of which an essential element is an intent to defraud. The Union submits that ridding the Postal Service of dishonest employees may be an imperative act of self-preservation; Hyde, however, "only delayed" the mails. The arbitrator found that Hyde's conduct was neither purposive nor undertaken for self-enrichment, and in addition to his compulsion to gamble, he was "emotionally sick" from other personal problems which he appeared to be making appropriate efforts to overcome.

As had the window clerk, however, Hyde also violated a public trust by failing to perform his own primary duty, viz., properly delivering the mail entrusted to him, and his conduct does no less mischief

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[3] The court did warn that "[t]his opinion is not to be taken as authority for the proposition that there is a public policy against the Postal Service employing anyone who has been convicted of a crime." 736 F.2d at 825.

to the operation of the postal system simply because it originates in deficits of character arguably more forgiveable than cupidity. The inexorability of the mails, upon which literally millions depend daily, is equally compromised whether postal workers are derelict in their duties for reasons of avarice, indolence, or distractive vices such as gambling. The public policy which must prevail in such cases, when a choice must be made, is that which gives best assurance of an efficient and reliable postal service, and that policy is *not* one of deference to arbitral autonomy in individual grievance cases, no matter how conscientiously the arbitrator may have sought to match the penalty to the culpability of the offender. The Postal Service must retain the ability to remove postal employees it does not fully trust from positions vulnerable to breaches of trust; the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabilitation of a single letter carrier.[4]

This Court does not lightly discard the compassionate conclusions of the arbitrator. It is well aware of other courts' admonitions that "[p]ublic policy should not be turned into 'a facile method of substituting judicial for arbitral judgment[,]'" *Amalgamated Transit Union v. Aztex Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981) (citation omitted), and that "[a]

[4] This case casts the shadow of, but does not present, the larger question of whether the Postal Service may ever, by a collective bargaining agreement, allow such an issue to fall to an arbitrator by way of the grievance process. Decisions as to who will be permitted to carry the mail so directly affect the integrity of the mail delivery system, a public function essential to the nation's general well-being, that public policy may very well find them to be altogether non-delegable.

court should exercise extreme caution before declaring that an arbitral award violates public policy." *Amalgamated Meat Cutters and Butcher Workmen v. Great Western Food Co.*, 712 F.2d 122, 124 (5th Cir. 1983). Nevertheless, as it obviously was in the latter case in which an appeals court reversed the district court's enforcement of an arbitration award directing an employer to reinstate a truck driver whose on-the-job drinking caused an accident, it must also be remembered that an arbitrator "does not sit to dispense his own brand of industrial justice," *Enterprise Wheel* 363 U.S. at 597, 80 S.Ct. at 1361, and his decision is not inviolate merely because the law of labor relations favors arbitration.

For the foregoing reasons, therefore, it is, this 4th day of April, 1986,

ORDERED, that defendant's motion for summary judgment is denied; and it is

FURTHER ORDERED, that plaintiff's motion for summary judgment is granted, and the arbitrator's decision of April 12, 1985, ordering the reinstatement of Edward Hyde as a letter carrier with the United States Postal Service is vacated.

APPENDIX C

REGULAR ARBITRATION PANEL

Case No: N1N-1M-D38371

Grievant: EDWARD B. HYDE

Post Office: Garden City, New York

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Before ARTHUR TALMADGE, Arbitrator

Date of Hearing: April 3, 1985

Place of Hearing: Garden City Post Office, Garden City, New York

Award: The Grievant, EDWARD B. HYDE, is to be placed on a medical leave of absence without pay for sixty (60) days from the date of this Award which leave may be extended by the mutual agreement of the parties. At the end of such period of leave, if it is shown that he has attended Gamblers Anonymous

meetings regularly, that he had fully cooperated with its members who are endeavoring to help him, that he has not participated in any gambling and that he is physically able to return to work, his Removal is to be set aside and he is to be reinstated without back pay. If he is unable to meet these requirements, the Removal is upheld.

Date of Award: April 12, 1985

Pursuant to the rules and procedures of the Collective Bargaining Agreement between the National Association of Letter Carriers (hereinafter the Union) and the United States Postal Service (hereinafter the Service) the undersigned was designated as Arbitrator to hear and render a final and binding Award concerning the following disputed issue:

Was the removal of the Grievant, EDWARD B. HYDE, for just cause? If not, what should the remedy be?

BACKGROUND

In the *Notice of Proposed Removal* (dated June 27, 1984) the Service charged the Grievant as follows:

> Charge No. 1: You are charged with unauthorized possession of U.S. Mail.
>
> Charge No. 2: You are charged with unlawful Delay of Mail.

The Service amplified its charges and put forward its reasons for the removal of the Grievant:

> On June 12, 1984, at approximately 8:00 p.m., the Garden City Police impounded a 1972 gold Cadillac sedan, New York plate number 4725AFZ from a parking field in Garden City. . . .

It was later learned that this vehicle belonged to you, Edward B. Hyde. A police examination of some of the debris in plain view in the vehicle disclosed U.S. Mail addressed to parties other than yourself.

. . . . .

The search by Postal Inspectors disclosed approximately 3,550 pieces of U.S. Mail addressed to customers residing along Garden City Carrier Route #2 which has been serviced by you, Edward B. Hyde, for approximately six (6) years. Approximately 50% of the mail was first class mail. Included in this mail were commercial checks and U.S. Treasury checks dating as far back as April 1, 1983. In addition, approximately 250 pieces of first class Garden City mail was recovered from the vehicle.

The Service relied upon the following sections of the *M-41 Handbook*:

> *Part 112.32. City Delivery Carriers Duties and Responsibilities: Security* . . . Carriers return all mail, money and equipment to the post office at the end of the work day . . . .
>
> . . . . .

You failed to meet this requirement and kept mail within your possession without permission.

The search by the Postal Inspectors was made on June 13, 1984. First class mail was found in your vehicle dated as far back as April 1983.

The Service relied on *Part 131.33 of the M-41 Handbook*:

> . . . unless otherwise instructed by a unit manager, deliver all mail distributed to your route prior to the leaving time for that trip and complete the delivery within scheduled time. It is your responsibility to inform management when this cannot be done.

You failed to meet this requirement and unlawfully delayed the mail entrusted to you for your delivery.

/s/ J. R. Bethea
Supervisor of
Delivery and Collections

The Service amplified on its position in its *Letter of Decision* to remove the Grievant (dated August 6, 1984).

> As a Carrier with almost sixteen (16) years of experience, you are well aware of the obligation we have to the public we serve. Delaying the mail, especially in the case of pieces which were delayed for over one (1) year, is tantamount to theft in that not only did you fail to provide our customers with a service that you are paid to give but you violated the sanctity of the trust placed in us by not delivering to them their "property."

. . . . .

Your representative requests that we take into consideration your gambling problem as well as other problems and mitigate the penalty. He has submitted statements that you have entered counseling for your problem. Whereas it may be commendable that you are seeking help, it is also very important to note that you did not do so until after the delayed mail was discovered in the trunk of your car.

. . . . .

In light of these facts, I find your removal from the U.S. Postal Service is warranted. . . . I believe that your representative's statement describing the circumstances as "basically dereliction of duty" aptly applies . . . . you neglected and/or abandoned the customers you were assigned to service. I cannot, therefore, believe in good conscience that your retention would promote the efficiency of the Postal Service. The removal will be effective on August 20, 1984.

/s/ Margaret Hansler
Superintendent of
Postal Operations
Garden City, New York

Pertinent Judicial Proceedings

On June 13, 1984, the Grievant was arrested by the U.S. Postal Inspectors and brought to the U.S. Magistrate, U.S. District Court, Brooklyn, New York and charged with unlawful delay of mail.

On September 19, 1984, the Grievant entered a plea of Guilty to *18 U.S. Code 1703(b), Delay of Mail.* The Grievant was sentenced to 18 months probation. A condition of the Grievant's probation was that he enroll in and successfully complete a compulsive gamblers rehabilitation program (Joint Exhibit #2, Item #6).

DISCUSSION

The significant details were not in dispute. The Union did not contradict the essential facts. It therefore appears that the Grievant was not arguing innocence, but mitigation, which goes to the severity of the penalty, not to the threshhold question of guilt or innocence.

The Union advanced the following factors: He had been a sixteen-year conscientious Carrier. The Grievant was "emotionally sick." The Grievant, in effect, was suffering a mental illness. He had endured a series of family losses: the death of his father, the near killing of his brother and his own surgery for a major cancer. The Grievant is now getting his life together. He should be given this chance. The Union stressed that controlling the Grievant's behavior and overriding all phases of his conduct was his "compulsive gambling." The Grievant, as a compulsive gambler, was driven to perform irrational acts. This compulsion has led him into moral deterioration and misery—he was pushed off the precipice.

The Grievant is salvageable—he could be a productive employee. He has begun to gain insight into himself. The parties have, through a joint effort, created a widely heralded pioneering rehabilitation program for alcoholics: PAR (Article 35). The spirit of *Article 35* which in part reads: "The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance, and follow-up of the employees afflicted by the disease of alcoholism." The spirit and awareness of this program should apply to "compulsive gambling." This is an all-pervasive disorder. The Grievant has been struggling these past years to deal with "this illness." The time is ripe for him to be returned to work so that he can keep his head high.*

The Service contended that in view of the serious nature of the charges, it had a right to remove the Grievant. It argued that the Grievant was in violation of the rules of the *Employee and Labor Manual*, namely *Sections 661.1-666.5*, which in critical part read, "It does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation" and, *Section 661.53* which asserts that "No employee shall engage in criminally dishonest or immoral conduct." The Service insisted

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* The Counselling Service Psychologist reported "he (the Grievant) is well motivated and conscientious." In a later report the Psychologist observed that "Ed (Hyde) is attempting to straighten himself out. He does not impress us as someone who attempts to rob or intentionally interfere with the postal system's normal routines." (See, Counselling Service's Psychologist Comments in Letters of July 9, 1984 and July 18, 1984.)

that there was no basis for mitigation. The Grievant was discharged for just cause for the unauthorized possession of the U.S. Mail and unlawful delay of mail. The employee may have enrolled in a program of rehabilitation through Gamblers Anonymous —but this was not done until the delayed mail was discovered by the Garden City Police and the Postal Inspectors. The Grievant did not try to get "his situation" under control until his "acts were uncovered." The Postal Service lived up to its obligation. The Grievant did not. The removal was for just cause and it should be upheld.

Arbitrators have endorsed certain principles in trying to balance the needs of the society, of "the mentally ill" (the compulsive gambler), and the needs of the employee—and have identified this differentiating characteristic, namely—the possibility of rehabilitation.

It is this Arbitrator's judgment that if any reasonable hope exists for the rehabilitation of the Grievant and the returning of him to the work place, no one should deny him this opportunity.

At the Arbitration hearings, evidence was introduced that the Grievant was enrolled in *Gamblers Anonymous*. The Federal District Court in placing the Grievant on a *probationary status*, mandated the Grievant's enrollment in the *Gamblers Anonymous* program. The Arbitrator was impressed by the poignant testimony given by the two sponsors from Gamblers Anonymous who avowed that "recovery" was a lifetime commitment." On the other hand, the sponsor with twenty-two years in Gambler's Anonymous asserted that "GA" had been his salvation.

The Arbitrator is not qualified to make a clinical judgment but to admit he is confronted with a basic

dilemma as to the issue of compulsive gambling as a "treatable illness."

I note that the basic contractual language of *Article 35* refers to *Alcohol and Drug Recovery Programs.* The employee afflicted with "alcoholism" has visible overt signs, while the compulsive gambler's conduct does not. Suffice it to say that there is an expanding occupational approach to compulsive gambling. The American Psychiatric Association has created a general diagnostic category entitled "Pathology of Disorder of Compulsive Gambling." (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 312.31, 3rd Ed. (APA, 1980).)*

The Arbitrator is mindful that the Grievant *did not enroll* in the Gamblers Anonymous until after removal, and that as a general principle, post-discharge behavior has no bearing on whether the Service has just cause for discharge.

However, the evidence shows that since the Grievant received the *Notice of Removal,* he enrolled in Gamblers Anonymous and has regularly attended its sessions. He has taken help from the Long Island Council of Churches Counseling Service. Representatives of these agencies have issued statements that he is so doing. No contradictory evidence was submitted on that point.

The Arbitrator is not able to foretell what the future prospects of the Grievant's rehabilitation may yield.

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* The Grievant's "unlawful delaying" of the mail was by any measure not purposive. The leaving of the mail in the midst of the debris in the Grievant's vehicle was not for *gain* or self aggrandizement. It was aimless and irrational.

This is indeed a tough decision. There is the threat of recurrence of misconduct. There is a challenge to the Arbitrator in his substituting his judgment for that of management.

This Arbitrator was moved by the wisdom and boldness of Arbitrator Cohen in *Samuel Bingham Co.,* 67 LA 708 (1976):

> Safety is desirable of course but to attempt to create an absolutely riskless society is to place an impossible burden on the public. Some risk must be assumed. If "injury" should result from the Grievant's reinstatement then the time to decide whether or not the Grievant's employment is considered a hazard—he should be discharged. I realize that such injury may be costly to the Grievant or even to other employees or to the public. But if we refuse in the name of *safety* to take the small risk, *safety* becomes callousness and indifference.

The underlying psychiatric problem that led to the offense did not in itself render the employee unfit for further employment.

Under the given circumstances, the Arbitrator is not totally persuaded that the Grievant presently has the emotional ability to perform the work in an acceptable manner. (Cf. *E and LR Manual 873, Reinstatement of Recovered Alcoholics.*)

Accordingly, I issue the following

AWARD

The Grievant, EDWARD B. HYDE, is to be placed on a medical leave of absence without pay for sixty (60) days from the date of this Award, which leave may be extended by the mutual agreement of the

parties. At the end of such period of leave, if it is shown that he has attended Gamblers Anonymous meetings regularly, that he has fully cooperated with its members who are endeavoring to help him, that he has not participated in any gambling and that he is physically able to return to work, his removal is to be set aside and he is to be reinstated without back pay. If he is unable to meet these conditions, the removal is upheld.

/s/ Arthur Talmadge
ARTHUR TALMADGE
Arbitrator

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 86-5296

UNITED STATES POSTAL SERVICE

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Civil Action No. 85-02206

[Filed Feb. 13, 1987]

Before: MIKVA, EDWARDS and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and was briefed by counsel for the parties. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: February 13, 1987
Opinion for the Court Per Curiam.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 86-5296

UNITED STATES POSTAL SERVICE

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

CA No. 85-02206

[Filed Apr. 9, 1987]

Before: MIKVA, EDWARDS and WILLIAMS, Circuit Judges.

ORDER

Upon consideration of appellee's petition for rehearing, filed March 27, 1987, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 86-5296

UNITED STATES POSTAL SERVICE

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

CA No. 85-02206

[Filed Apr. 24, 1987]

Before: MIKVA, EDWARDS and WILLIAMS, Circuit Judges.

ORDER

Upon consideration of the motion of the United States Postal Service to stay mandate, filed April 13, 1987, it is

ORDERED, by the court, that the motion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-820

UNITED STATES POSTAL SERVICE

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

ON APPLICATION FOR STAY

[May 21, 1987]

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant United States Postal Service asks that I stay the mandate of the Court of Appeals for the District of Columbia Circuit, enforcing an arbitrator's decision that applicant reinstate Edward Hyde as a postal worker. In 1984, Hyde was convicted of unlawful delay of the mail by a postal employee after postal inspectors found more than 3,500 pieces of undelivered mail in his possession. The Postal Service discharged Hyde for dereliction of duty. Respondent filed a grievance against applicant on Hyde's behalf, seeking arbitration. The arbitrator ordered that applicant reinstate Hyde after a 60-day medical leave of absence. Applicant filed suit, seeking to set aside the award as contrary to public policy. The District Court set aside the arbitrator's decision, finding that

the Postal Service must retain the power to remove employees who breach the public trust and hamper the strong public interest in ensuring prompt delivery of the mails. 631 F. Supp. 599 (DDC 1986). The Court of Appeals reversed, holding that a court may set aside an arbitrator's award as contrary to public policy only when the award itself violates established law or compels unlawful conduct. 810 F. 2d 1239 (1987).

The standards for granting a stay pending a petition for certiorari are well settled: a Circuit Justice is required "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Heckler* v. *Redbud Hospital District*, 473 U.S. 1308, 1311 (1985) (REHNQUIST, Circuit Justice), quoting *Gregory-Portland Independent School District* v. *United States*, 448 U.S. 1342, 1342 (1980).

In my view, the applicant has satisfied these requirements. There is a reasonable probability that four Justices will eventually grant certiorari in this case. The Court has already granted certiorari in *United Paperworkers International Union* v. *Misco, Inc.*, cert. granted, 479 U.S. —— (1987), which raises the identical issue: the scope of the public policy exception to enforcement of arbitration awards. Although that case presents the issue in the context of a private employer, applicant presents a stronger case for setting aside the arbitrator's award because it operates under a statutory mandate to ensure prompt delivery of the mails. See 39 U.S.C. § 101(a). Moreover, I find that the stay equities favor the applicant. Even the temporary reinstatement of Hyde, a convicted criminal, will seriously

impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers. While Hyde does have some interest in returning to his position, he has not worked for the applicant for almost three years. Continuation of the status quo will not work an irreparable harm on Hyde, but it will preserve the applicant's ability to carry out its legal obligations.

The application for a stay of the Court of Appeals' mandate pending the filing and disposition of a petition for certiorari is granted.

U. S. GOVERNMENT PRINTING OFFICE: 1987 181-401 40401

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
SEP 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-39

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE,
Petitioner,
v.
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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QUESTIONS PRESENTED

In this case as in *United Paperworkers' Int'l Union* v. *Misco, Inc.*, cert. granted, No. 86-651 (Jan. 12, 1987), the questions presented are:

1. Whether a federal court may refuse to enforce an arbitration award under a collective bargaining agreement on the ground that enforcement of the award would contravene "public policy," where the award neither construes the agreement in a manner that would make the agreement unlawful nor directs the employer to take any action that is prohibited by law.

2. If the Answer to Question 1 is "yes", what are the limits of the courts' power to refuse enforcement of arbitration awards on the basis of supposed contravention of public policy?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-59

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM FOR RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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1. This case involves a decision by a labor arbitrator requiring the Postal Service to reinstate an individual letter carrier, Edward Hyde, who had been discharged for delaying the mail. It is undisputed that Mr. Hyde, a sixteen year Postal Service veteran, committed his admittedly serious offense while suffering from a psychological disorder from which, as shown by the uncontradicted evidence below, he has been rehabilitated. See Respondent's Appendices ("Resp. App.") A-C.[1]

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[1] The arbitrator's decision was issued under a collective bargaining agreement between the Postal Service and respondent National Association of Letter Carriers, AFL-CIO ("NALC"),

The sole issue now presented is whether, as the Solicitor General contends, the court below should have vacated the arbitrator's reinstatement order on public policy grounds, pursuant to *W.R. Grace & Co.* v. *Local Union 759*, 461 U.S. 757 (1983), even though that court found no legal proscription against the employer's reinstatement of the grievant. The same issue is already before this Court in *United Paperworkers Int'l Union* v. *Misco, Inc.*, cert. granted, No. 86-561 (Jan. 12, 1987), a case in which the Fifth Circuit did vacate an arbitrator's award of reinstatement despite the absence of any laws or legal precedents specifically prohibiting the reinstatement of the grievant in that case.

Here, precisely as in *Misco*, a duly authorized arbitrator has ruled that the discharge of an individual employee was inconsistent with the employer's obligations under a collective bargaining agreement, and ordered that the employee be reinstated. In both cases, the contractual obligations at issue, as interpreted by the arbitrator, did not violate any rule of law, and the employers remain legally free to comply with the award. The single question presented, both here and in *Misco*, is whether the employer may invoke the public policy doctrine to vacate the otherwise lawful arbitration award.

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providing a standard grievance procedure culminating in third-party arbitration, pursuant to the Postal Reorganization Act of 1970 ("PRA"), 39 U.S.C. §§ 101-5605; see especially § 1206(b). That agreement also provided that no employee could be disciplined or dicharged except for "just cause," and that any discipline "should be corrective in nature, rather than punitive." See Joint Appendix in the court below at 40-45.

In this case the arbitrator recognized that there were sufficient grounds to discipline Mr. Hyde for his misconduct—failing to deliver over 3,000 pieces of mail—but found that the facts—particularly Mr. Hyde's compulsive gambling disorder—warranted mitigation of the discharge penalty. Petitioner's Appendix ("Pet. App.") 19a. See *infra* at 10.

Insofar as that question will be resolved in *Misco*, granting plenary review here would be utterly superfluous. Particularly in light of the fact that *Misco* is scheduled for oral argument on October 13, 1987, granting such review would interfere with the Court's ability to manage its docket efficiently and sensibly. At most, the petition here should be held for disposition in light of *Misco*.

2. Contrary to the Solicitor's contention, review of this case "independent of *Misco*" is not warranted by the Postal Service's status as a "public employer." As we now show, the PRA requires that the Postal Service—unlike other federal agencies—be treated, for present purposes, the same as employers in the private sector.[2]

a. The United States Postal Service, the successor agency to the Post Office Department, was created in 1970 by the PRA. See 39 U.S.C. § 201. In enacting the PRA, Congress " 'launched [the Postal Service] into the commercial world,' " *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 519 (1984), so as "to be treated similarly to other self-sustaining commercial ventures." *Id.* at 525. Congress recognized that:

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[2] The Solicitor claims that "the issue here is of obvious importance to federal government employers generally." Pet. at 11. But the petition does not suggest any reasons why a Supreme Court precedent needs to be set for judicial review of arbitrations involving federal agencies other than the Postal Service. There is no indication, for example, that such arbitrations have given rise to extensive litigation, or that the lower courts have reviewed such awards incorrectly or inconsistently. Moreover, as we show herein, Congress specifically intended to set the Postal Service apart from all other federal agencies, and to put its employees in a category as nearly as possible like private enterprise employees. 116 Cong. Rec. 20,226 (1970) (remarks of Rep. Udall); 116 Cong. Rec. 21,709 (1970) (remarks of Sen. McGee). Any special pronouncement regarding the scope of the public policy exception as it applies to labor arbitrations involving the Postal Service would therefore have little, if any, application to federal government employers generally.

> Delivering the mail is simply not in the same category of policymaking and program-development as foreign policy, national defense, housing, highway construction, or health and education assistance to State and local governments. It is an essential, business-oriented service.

116 Cong. Rec. 21,709 (1970) (remarks of Sen. McGee, Chairman of the Senate Committee on Post Office and Civil Service). See also 116 Cong. Rec. 20,227 (1970) (remarks of Rep. Olsen) (stating that the proposed bill would create a postal service "operated as any other part of the private sector, that is, in the public utility business").

Congress therefore sought to "bring postal labor relations within the same structure that exists for nationwide enterprises in the private-sector." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 13 (1970) (hereinafter "House Report"). The statute provides that labor relations in the Postal Service—unlike any other federal agency—are governed by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. See 39 U.S.C. § 1209(a).

b. The history of postal reorganization clearly demonstrates that providing for this application of private sector labor relations principles to the Postal Service was an overriding concern of Congress, the President, the Postmaster General, the postal unions and the other advocates of postal reform.

For example, in 1968, President Johnson's Commission on Postal Organization (hereinafter the "Kappel Commission") found that labor-management relations in the Post Office Department were unproductive, and that employee morale was low. See *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* ("*Kappel Commission Report*") 18-22, 120 (1968). According to that Commission's report to the President, "[m]any of the problems in this area

stem[med] from the exclusion from bargaining of most items bargainable between management and labor in the private sector," and also, in part, "from a provision in [Executive Order 10,988, 27 Fed. Reg. 551 (1962)] forbidding binding third-party arbitration." *Kappel Commission Report* at 20. See Exec. Order 10,988, § 8(b). The Commission recommended collective bargaining over all matters negotiated in the private sector. *Id.* at 59. With respect to the reform of the existing grievance procedure, the Commission recommended that

> [c]ontracts between the postal unions and management might well provide for binding third-party arbitration of agreed-upon types of grievances arising under the contract. In the private sector such agreements are common; they typically authorize an arbitrator to interpret and apply the contract, while withholding from him authority to modify the contract itself in any way. Such agreements usually provide for the arbitration of disciplinary cases, including discharges.

Id.

In 1969, bills were introduced in Congress which incorporated the recommendations of the Kappel Commission, see H.R. 4, 91st Cong., 1st Sess. (1969); H.R. 11750, 91st Cong., 1st Sess. (1969). During hearings on these bills, Postmaster General Blount sharply criticized the existing postal "labor-management structure" as "radically wrong for a major communications enterprise in today's industrial economy," and strongly advocated proposals for collective bargaining and "grievance procedures similar to those that have come to be accepted as commonplace in the private sector." He noted that "[t]his system has worked very well in American industry generally." *Hearings Before the Senate Comm. on Post Office and Civil Serv.*, 91st Cong., 1st Sess. 535-7 (1969).

The PRA was finally enacted in 1970 in direct response to a "crisis" precipitated by a nation-wide work

stoppage by postal employees in March of that year. House Report at 3. Immediately following the work stoppage, representatives of the Nixon Administration and the postal unions entered into negotiations on a package of legislative recommendations to Congress on postal reform. On April 16, the unions and the Postmaster General executed an agreement calling for legislation that would, *inter alia*: "requir[e] collective bargaining over all aspects of wages, hours and working conditions including grievance procedures, and in general, all matters that are subject to collective bargaining in the private sector." *Id.* at 57.

President Nixon immediately endorsed this agreement. In his transmittal message to Congress, the President stressed that the proposals for collective bargaining and grievance arbitration, modeled after the private sector, were essential to provide an "alternative to strikes . . . an absolutely impartial means of resolving differences between postal management and postal employees." Message from the President of the United States Relative to Postal Reform (Apr. 16, 1970), *reprinted in* House Report at 53. The President also noted that, "in addition to wages and hours, matters that are subject to collective bargaining [under the proposed legislation] would include such things as grievance procedures [and] final and binding arbitration of disputes. . . ." *Id.*

The committee reports accompanying the new legislation confirm that Congress, like the President, considered the application of private sector labor relations to the Postal Service to be perhaps the single most important aspect of postal reform.

> Although the needs for postal reform are as interrelated as they are manifold, certainly no single need is more insistent than that for reform of the labor-management structure. Events of last March [i.e. the work stoppage], however deplorable they may be, have finally established that a basic change in postal labor relations is overdue. Although contemporary labor relations in the private sector of the national economy have not been free of problems, they add up to a triumphant success as compared with those in the Postal Service.

House Report at 13. See also S. Rep. No. 912, 91st Cong., 2d Sess. 7 (1970).

c. The Solicitor's assertion that in the Postal Service—as distinguished from the private sector—arbitral awards are subordinate to "the congressional commitment of administrative discretion to the Postal Service to determine how to carry out its basic mission," Pet. 14-15, is simply wrong. To the contrary, Section 1001(e) of the PRA expressly provides that the Postal Service's exercise of its most basic powers must be "consistent with . . . chapter 12 of this title . . . *and collective bargaining agreements*" (emphasis supplied). This fundamental limitation on the Postal Service's discretion applies, *inter alia*, to its authority:

> (1) to direct officers and employees of the Postal Service in the performance of official duties;
>
> (2) to hire, promote, transfer, assign, and retain officer and employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such officers and employees . . .
>
> (4) to maintain the efficiency of the operations entrusted to it;
>
> (5) to determine the methods, means, and personnel by which such operations are to be conducted . . .

39 U.S.C. § 1001(e) (1), (2), (4), (5).

Section 1001(e) stands in marked contrast to Executive Order 10,988 which governed labor relations in the Post Office Department prior to reorganization. The Executive Order actually prohibited any agreement between the Post Office and a postal union from imposing any

restrictions on the Post Office Department's absolute authority to exercise management rights virtually identicai to those now spelled out in Section 1001(e). Compare Exec. Order 10,998, § 7(2)(a)-(f) with 39 U.S.C. § 1001 (e)(1)-(5), (7). See also Exec. Order 10,988, § 6(b). In reorganizing the Post Office, Congress abandoned this prohibition in favor of a regime in which collective bargaining is paramount. See, e.g., H.R. Conf. Rep. No. 1363, 91st Cong., 2d Sess. 88 (1970).

In sum, the Solicitor's position that "the substantive law governing the enforcement of Postal Service labor contracts" should remain distinct from the private sector, Pet. 12-13, is manifestly inconsistent with the intent of Congress. As Representative Udall, one of the PRA's sponsors, put it

> It is vital that this aspect of the postal reform bill be understood. We are truly creating a new kind of Federal employee, embodying him with the protection of many regular civil service provisos, while giving him collective bargaining—with binding arbitration as his last resort—*identical to the private enterprise employee.*

116 Cong. Rec. 20,230 (1970) (emphasis supplied). See also 116 Cong. Rec. 19,845 (1970) (remarks of Rep. Dulski); 116 Cong. Rec. 27,602 (1970) (remarks of Rep. Derwinski); *Hearings on H.R. 17070 Before the House Comm. on Post Office and Civil Serv.*, 91st Cong., 2d Sess. 27 (1970) (remarks of Winton M. Blount, Postmaster General) (". . . in designing this legislation . . . we have attempted to subject to the U.S. Postal Service as much as possible to the labor laws of the land.")

d. The case law does not suggest any justification or rationale for creating here a unique Postal Service precedent on the public policy doctrine, separate and distinct from *Misco.*

Contrary to the Solicitor's suggestion, Pet. 13, judicial decisions under Section 1208(b) of the PRA—the jurisdictional basis for suits invoking the public policy doctrine—have consistently recognized and applied the same body of legal principles in Postal Service cases that has been developed in private sector cases under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. See *Bowen* v. *United States Postal Service*, 459 U.S. 212, 232, n.2 (1983) (White, J., dissenting). See also *Johnson* v. *United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985); *Abernathy* v. *United States Postal Service*, 740 F.2d 612, 614 (8th Cir. 1984); *Melendy* v. *United States Postal Service*, 589 F.2d 256 (7th Cir. 1978); *Malone* v. *United States Postal Service*, 526 F.2d 1099, 1109-10 (6th Cir. 1975).

In cases involving challenges to arbitral awards on public policy grounds, the courts have drawn no distinction between public policy case precedent involving the Postal Service and cases involving private sector employers. Regardless of their view of the scope of the public policy doctrine, the courts have freely applied holdings from private sector cases to such challenges in postal cases, and holdings from postal cases to such challenges in the private sector. See *S.D. Warren Co.* v. *United Paperworkers Int'l Union*, 815 F.2d 178, 187 (1st Cir. 1987); *United States Postal Service* v. *National Ass'n of Letter Carriers, AFL-CIO*, 810 F.2d 1239, 1241 (D.C. Cir. 1987), petition for cert. filed, No. 87-59 (July 8, 1987); *Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 808 F.2d 76, 83 (D.C. Cir. 1987), petition for cert. filed, 55 U.S.L.W. 3678 (U.S. Apr. 7, 1987) (No. 86-1548); *E.I. DuPont de Nemours and Co.* v. *Grasselli Employees Indep Ass'n*, 790 F.2d 611, 616 (7th Cir. 1986), cert. denied, 107 S.Ct. 186 (1986); *United States Postal Service* v. *American Postal Workers Union*, 736 F.2d 822, 824-25 (1st Cir. 1984). Indeed, both the postal and private sector cases feature the same recurring employer concerns, typically stemming from allegations of criminal misconduct or intoxication.

In any event, the lower courts have obviously had no difficulty in applying a uniform public policy principle to

both private sector and Postal Service cases. There is no need for a separate Postal Service precedent to be set here.

3. The Solicitor's assertion that the arbitrator's award should be vacated is based on specific factual claims which do not warrant the Court's attention and are, in any event, not supported by any evidence in the record.

There is no evidentiary basis, for example, for the contention that the restoration of Mr. Hyde, a sixteen-year veteran letter carrier, would place postal patrons "at risk." Pet. 18. To the contrary, in the proceedings below, NALC submitted declarations showing that Mr. Hyde has been rehabilitated from the compulsive gambling disorder which prompted his misconduct and that he is presently fit to return to work. Resp. App. A-C, *infra*. After his 60-day leave of absence two years ago, Mr. Hyde was examined and declared fit for duty by a Postal Service physician. Resp. App. 2a. For the past two and a half years he has maintained a seven-day-per-week newspaper delivery job. *Id.* The Postal Service has *never* offered any evidence challenging the fact of his rehabilitation.

Similarly, there is no evidence in the record supporting the Solicitor's apparent suggestion that the arbitrator's decision, as an example and as a precedent, may encourage misconduct by Mr. Hyde's co-workers. Pet. 18. The Postal Service offered no evidence showing how many employees work in Mr. Hyde's office or may be aware of his case. Given the evidentiary vacuum, the Solicitor's claims concerning the impact of the award on Mr. Hyde's co-workers amount to nothing more than speculation by appellate lawyers.

Moreover, there is no sound basis for even this speculation. Any employee contemplating an act of misconduct would learn from Mr. Hyde's case that he risks criminal conviction, potential discharge, and at the very least, a lengthy suspension without pay. Indeed, such an em-

ployee would also learn that he may escape discharge *only if he can offer convincing proof to an arbitrator that he has suffered from a severe mental disorder from which he has been rehabilitated!*

CONCLUSION

The Solicitor General's request for plenary review independent of *United Paperworkers Int'l Union* v. *Misco, Inc.* should be denied. At most, this case should be held for disposition in light of the Court's decision in *Misco.*

Respectfully submitted,

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September, 1987

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5296

UNITED STATES POSTAL SERVICE,
Appellee,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Appellant.

Appeal from the United States District Court
for the District of Columbia

No. 85-2206—Hon. Thomas P. Jackson

DECLARATION OF EDWARD HYDE IN SUPPORT OF APPELLANT NALC'S OPPOSITION TO APPELLEE'S STAY APPLICATION

EDWARD HYDE, declares under penalty of perjury:

1. I am the Postal Service employee on whose behalf the National Association of Letter Carriers, AFL-CIO ("NALC"), brought the grievance at issue in this action.

2. The United States Postal Service ("Postal Service") discharged me from my job as a letter carrier on August 20, 1984. Pursuant to the April 12, 1985 arbitration award at issue in this action, the Postal Service was directed to reinstate me to my position after I was

placed on a sixty-day medical leave of absence, subject to my regular attendance at Gamblers Anonymous ("GA") meetings during that period.

3. I began attending GA meetings on April 17, 1984, *before* my discharge, have attended such meetings at least once a week since that time, and fully intend to continue attending such meetings. I have not participated in any gambling since April 16, 1984. Since becoming a member of GA, I have sponsored new members and have attempted to help them overcome their gambling problems.

4. After I served my sixty-day leave of absence as ordered by the arbitrator, I attended a fitness-for-duty examination performed by a United States Postal Service physician who thereby determined that I was physically able to return to work.

5. Since my discharge from the Postal Service I have made numerous attempts to secure employment. Nevertheless, in virtually every case I was denied employment after the prospective employer learned that I had been fired from the Postal Service and that I was a reformed gambler.

6. In or around September, 1984, a member of GA offered me a job as a newspaper deliverer for Newsday. From that time until the present I have delivered papers for Newsday either as a "sampler" (serving routes for which regular delivery personnel were temporarily unavailable) or as an "estate deliverer" (regularly servicing my own route).

7. Currently, as an estate deliverer, I work seven days a week. My weekly salary is about $180, before taxes. However, since I am fully responsible for the upkeep of my automobile, including fuel and maintenance, and for providing items, such as plastic bags and rubber bands, necessary for delivering newspapers, my work-related expenses total approximately $75 to $100 per week.

8. After I was fired by the Postal Service I moved twice. Since in or around January, 1987, however, I have been unable to find affordable housing. I have therefore been sleeping either in my car or the Newsday office for the last three and a half months. Once or twice a week, if I can afford it, I rent a room for four or five hours at a local hotel in order to bathe.

9. My parents are both deceased and the two remaining members of my immediate family, a brother and a sister, live in Florida.

10. While I was employed with the Postal Service, the NALC Health Benefit Plan provided me with nearly complete health care insurance. I was also able to maintain a $100,000 life insurance policy through a wage deduction program. My current job provides no health care or life insurance benefits. I therefore would be unable to pay for my major medical costs should I become sick. This troubles me a great deal, since only a few years ago I underwent major surgery for cancer.

11. I currently owe substantial sums of money to several individuals, institutions and businesses including the following approximate amounts: $650 plus interest to the federal government for back taxes; $1,800 to car rental companies for cars I rented in order to maintain my job; $7,000 to friends and members of my family for personal loans; $5,000 to my personal attorney for representing me in criminal proceedings related to this case; $7,600 in the aggregate to two credit unions for personal loans; and $2,000 to a Florida funeral home for my mother's funeral.

12. I have every intention of repaying these debts, but at my current income I cannot afford housing, let alone monthly payments to creditors.

13. I am confident that as soon as I am reinstated to employment with the Postal Service I will be able to discharge fully and diligently all duties required of a city

letter carrier, or any other position for which I am qualified.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Edward Hyde
EDWARD HYDE

Signed in New York, New York
this 20th day of April, 1987.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2206

UNITED STATES POSTAL SERVICE,
Plaintiff,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Defendant.

DECLARATION OF EDWARD B. HYDE

EDWARD B. HYDE declares under penalty of perjury:

1. I am the grievant about whom the arbitral award in this lawsuit concerns. I am fully familiar with that award and the remedy set forth therein.

2. Arbitrator Talmadge ordered in that award that I was to be placed on a medical leave of absence without pay for sixty days from the date of that award, that is, from April 12, 1985, leave which could be extended by mutual agreement of the parties.

3. The Arbitrator further ordered:

> At the end of such period of leave, if it is shown that he has attended Gamblers Anonymous meetings regularly, that he has fully cooperated with its members who are endeavoring to help him, that he has not participated in any gambling and that he is physically able to return to work, his Removal is to be set aside and he is to be reinstated without back

pay. If he is unable to meet these requirements, the Removal is upheld.

4. The sixty day leave period set forth in the Award ended on June 11, 1985. On information and belief, my medical leave was not extended by the parties.

5. During that period of leave, and ongoingly until the present, I have attended Gamblers Anonymous meetings regularly.

6. Throughout the sixty-day period and until the present, I have fully cooperated with members of Gamblers Anonymous who are endeavoring to help me.

7. I have not participated in any gambling since the date of the Award.

8. I attended a fitness-for-duty examination performed by United States Postal Service physician who thereby determined that I was physically able to return to work.

9. Consequently, I have met all the conditions set forth in the Award and am entitled, by its terms, to have the removal set aside and to be reinstated.

10. The Postal Service has refused to reinstate me.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Edward B. Hyde
EDWARD B. HYDE

Signed in New York, New York
This 16th day of January, 1986.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-2206

UNITED STATES POSTAL SERVICE,
Plaintiff,
v.
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Defendant.

DECLARATION OF RICHARD EBERT

Richard Ebert declares under penalty of perjury:

1. I am a member and the Secretary of Gamblers Anonymous, Rockville Center Chapter. I am also sponsor to Edward B. Hyde.

2. Edward B. Hyde has been a member of the Rockville Center Chapter of Gamblers Anonymous since June 17, 1984. He has regularly attended meetings at least once a week since that time.

3. To my knowledge, Edward B. Hyde has abstained from gambling since he joined Gamblers Anonymous.

4. Edward Hyde has shown a sincere desire to recover from his compulsive gambling and, through his diligent participation in Gamblers Anonymous, is making every effort to effectuate that goal.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Richard Ebert
RICHARD EBERT

Signed in Nassau County
This 16th day of January, 1986.

PETITIONER'S

BRIEF

(3)

SUPREME COURT, U.S.
FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.

No. 87-59

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE, PETITIONER

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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52 pp

QUESTION PRESENTED

Whether an arbitration award ordering the Postal Service to reinstate an employee who has been discharged for, and criminally convicted of, failing to deliver thousands of pieces of mail should be set aside as contrary to public policy.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-59

UNITED STATES POSTAL SERVICE, PETITIONER

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 810 F.2d 1239. The opinion of the district court (Pet. App. 7a-13a) is reported at 631 F. Supp. 599.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-26a) was entered on February 13, 1987. A petition for rehearing was denied on April 9, 1987 (Pet. App. 27a). The petition for a writ of certiorari was filed on July 7, 1987, and was granted on December 14, 1987, limited to the second question presented in the petition. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions involved in this case are reprinted in an Appendix to this brief.

STATEMENT

1. In June 1984, police and postal inspectors made a lawful search of the personal automobile of Edward Hyde, a letter carrier for petitioner, the United States Postal Service (Pet. App. 8a). They found more than 3,500 pieces of undelivered mail addressed to residents on Mr. Hyde's delivery route and elsewhere (*ibid.*). Some of the mail contained commercial and United States Treasury checks; some had been delayed for more than a year (*ibid.*). Mr. Hyde was immediately arrested and charged with unauthorized possession and unlawful delay of the mails, in violation of 18 U.S.C. 1703 (Pet. App. 8a). In September 1984, he pled guilty to the latter offense and was sentenced to 18 months' probation, a condition of which was that he complete a rehabilitation program for compulsive gamblers (*ibid.*).

Because of his criminal dereliction of duty, Mr. Hyde was discharged by the Postal Service (Pet. App. 8a). Respondent, the National Association of Letter Carriers, AFL-CIO, filed a grievance on his behalf, arguing that the Postal Service was without "just cause" to discharge Mr. Hyde, as required by the collective bargaining agreement between the Postal Service and respondent (*ibid.*).[1] In April 1985, an arbitrator ordered the Postal Service to reinstate Mr. Hyde without backpay after a 60-day medical leave of absence (*id.* at 14a-24a). The arbitrator found that Mr. Hyde was a "compulsive gambler," that Mr. Hyde's unlawful delaying of the mails was related to his gambling disorder, and that Mr. Hyde was actively

[1] Pursuant to agreement with counsel for respondent, we are lodging 10 copies of the Postal Service's 1984-1987 collective bargaining agreement with the Clerk of the Court. This agreement does not differ in any pertinent respect from the collective bargaining agreement that was in effect at the time the arbitration award in this case was rendered.

attempting to rehabilitate himself (*id.* at 21a-22a & n.*). Accordingly, while acknowledging that he was unable "to foretell what the future prospects of [Mr. Hyde's] rehabilitation may yield" (*id.* at 22a), that "[t]here is the threat of recurrence of misconduct" (*id.* at 23a), and that Mr. Hyde could not yet be returned to work (*ibid.*), the arbitrator ruled that the Postal Service should set aside its removal decision at the end of a 60-day period, provided that Mr. Hyde regularly attended and participated in Gamblers Anonymous meetings during the 60-day period, refrained from any gambling, and established that he was physically fit to work (*id.* at 23a-24a). The arbitrator explained: "if any reasonable hope exists for the rehabilitation of [Mr. Hyde] and the returning of him to the work place, no one should deny him this opportunity" (*id.* at 21a).

2. In July 1985, the Postal Service filed the instant action seeking to vacate the award (Pet. App. 9a). On the parties' cross-motions for summary judgment, the district court recognized that "the strong federal policy favoring arbitration of labor disputes results in 'extremely limited' judicial review of arbitrators' awards" (*ibid.* (citation omitted)). It noted, however, that "[q]ualifying this general rule of judicial deference * * * is an exception which operates when an arbitrator's decision contravenes the law or some other public policy of comparable stature" (*ibid.*). The court concluded that enforcement of the arbitral award reinstating Mr. Hyde in the case would contravene such a public policy, to wit, the Postal Service's statutory obligation to ensure the "prompt, reliable, and efficient" delivery of the mails (Pet. App. 10a-11a). It explained (*id.* at 11a-12a) that Mr. Hyde

> violated a public trust by failing to perform his own primary duty, viz., properly delivering the mail entrusted to him, and his conduct does no less mischief to the operation of the postal system simply because it originates in deficits of character arguably more

forgiveable than cupidity. The inexorability of the mails, upon which literally millions depend daily, is equally compromised whether postal workers are derelict in their duties for reasons of avarice, indolence, or distractive vices such as gambling. The public policy which must prevail in such cases, when a choice must be made, is that which gives best assurance of an efficient and reliable postal service, and that policy is *not* one of deference to arbitral automony in individual grievance cases, no matter how conscientiously the arbitrator may have sought to match the penalty to the culpability of the offender. The Postal Service must retain the ability to remove postal employees it does not fully trust from positions vulnerable to breaches of trust; the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabilitation of a single letter carrier.

3. The court of appeals reversed (Pet. App. 1a-6a). It first stated (*id.* at 4a) that, "[i]n the instant case, the Postal Service does not (indeed, cannot) maintain that the arbitrator acted outside the bounds of the parties' collective bargaining agreement," noting that the arbitrator "interpreted the contract in order to decide whether Hyde had been discharged for 'just cause,' " and that "[t]he arbitrator's judgment on this issue was precisely what the parties had bargained for." The court then noted that, while "an arbitration award may be set aside as violative of public policy in certain 'limited circumstances' " (*ibid.* (citation omitted)), it had previously held that the "public policy" exception must be narrowly construed in order to avoid potentially intrusive judicial review of arbitral awards and thus may be applied only where an arbitral award itself violates established law or seeks to compel unlawful conduct (*id.* at 4a-5a (citations omitted)). Finally, it held (*id.* at 5a-6a) that, "[i]n this case, there is * * *

no basis for invoking the 'extremely narrow' public policy exception." The court declared that "[t]he Postal Service cannot identify any 'legal proscription against the reinstatement of a person such as [Mr. Hyde]' " and that it would not " 'impose its own brand of justice' by holding that the reinstatement of Hyde is inconsistent with the public's interest in an efficient and reliable postal service" (*ibid.* (citations omitted)).

4. On May 21, 1987, the Chief Justice, acting as Circuit Justice, granted the Postal Service's application for a stay of the court of appeals' mandate. The Chief Justice noted that the Postal Service "operates under a statutory mandate to ensure prompt delivery of the mails," that "[e]ven the temporary reinstatement of Hyde, a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers," and that "[c]ontinuation of the status quo will not work an irreparable harm on Hyde, but will preserve the applicant's ability to carry out its legal obligations" (Pet. App. 30a, 31a).

SUMMARY OF ARGUMENT

A. This Court has long held that courts must treat an arbitrator's interpretation of a collective bargaining agreement as the last word on the intent of the contracting parties. The Court has also held, however, that, before enforcing an award, a court must determine that the award is consistent with "public policy." In making this "public policy" determination, the court may not rely on its own notions of the public good. Rather, a court may refuse to enforce an arbitration award only if its enforcement would "compromise" or "violate" some "explicit public policy" that is "well defined and dominant" in "existing laws and legal precedents." *United Paperworkers Int'l Union* v. *Misco, Inc.*, No. 86-651 (Dec. 1, 1987), slip op. 12-13; *W.R. Grace & Co.* v. *Rubber Workers*, 461

U.S. 757, 766 (1983). While the precise contours of this doctrine can be discerned only by closely examining the Court's precedents, it is clear that an award is unenforceable if compliance with it would be inconsistent with a policy embodied in a federal statute, as properly interpreted by the courts or the agency charged with the statute's administration.

B. The arbitration award in this case is unenforceable under this standard. It compromises a well-defined and dominant public policy rooted in existing statutes, regulations, and legal precedent—*i.e.*, the requirement that the Postal Service ensure the security and reliability of the public mails.

The public has a vital interest in the security of the mails. In recognition thereof, Congress has commanded that the Postal Service "shall provide prompt, reliable, and efficient" mail services to the public, has created various civil and criminal sanctions to be imposed upon those (including Postal Service employees) who delay, destroy, disrupt, or misuse the mails, and has instructed the Postal Service to assist with the enforcement of these civil and criminal sanctions and otherwise to ensure that the security of the mails is maintained. The Postal Service, in turn, has devoted considerable attention and resources to the security of the mails—by, for example, imposing on its employees a Code of Ethical Conduct which provides for the discharge of any employee who delays or disrupts the mails. These statutory and regulatory provisions plainly establish a "public policy" within the meaning of the Court's cases.

Compliance with the arbitration award ordering Mr. Hyde's reinstatement would improperly compromise this public policy. Mr. Hyde failed over the course of a year to deliver more than 3,500 pieces of mail, conduct which resulted in a criminal conviction. Notwithstanding respondent's vigorous attempts to show that Mr. Hyde

had been rehabilitated, an arbitrator found that there was a threat of recurrence of misconduct, that Mr. Hyde could not be returned to work for at least sixty days, and that he—the arbitrator—could not foretell when, if ever, Mr. Hyde would be fully rehabilitated. In these circumstances, the statutory requirement that the security of the mails be ensured precludes Mr. Hyde's reinstatement. As the district court stated (Pet. App. 12a), "the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabiliation of a single letter carrier."

C. In its memorandum in opposition, respondent union has argued that the Postal Service should be required to reinstate Mr. Hyde because his reinstatement is not legally proscribed, because the Postal Service may validly contract away its authority to decide whether Mr. Hyde should be reinstated, and because the Postal Service has no reasonable grounds for concluding that reinstatement presents a threat to the security of the mails. These arguments are without merit and misunderstand the public policy doctrine. While we agree that care must be taken so that the efficacy of the arbitral process will not be undermined, proper application of the public policy doctrine will not do so. Rather, it will reconcile that process with the public law obligations to which the Postal Service is bound.

1. With respect to respondent's argument that Mr. Hyde's reinstatement is not legally proscribed, we believe that respondent has misunderstood the nature and scope of the Postal Service's statutory obligations. The Postal Service is statutorily required to ensure the security of the mails. Any action, such as Mr. Hyde's reinstatement, that would fundamentally impede or prevent the Postal Service from ensuring that the mails are secure is in fact legally proscribed. That the statute does not explicitly bar the Postal Service from employing an individual such as Mr.

Hyde begs the question whether Mr. Hyde's reinstatement is inconsistent with the Postal Service's statutory obligation to ensure that the mails are reliable and secure. That a statute (or other applicable constraint of public policy) speaks in broad terms does not diminish its force as a statement of public policy; indeed, it would be strange if the most fundamental and important statutory constraint on the Postal Service were given less force precisely because of its sweeping scope. Likewise, the fact that Mr. Hyde's reinstatement would not subject the Postal Service to judicial sanction does not mean that it is not legally proscribed. Congress has expressly commanded the Postal Service to "provide prompt, reliable, and efficient" mail services and, more particularly, has enjoined it to protect the security of the mails; these statutory commands are as much legal obligations that the Postal Service is bound to honor as is a judicially enforceable requirement of positive law.

2. Nor is the Postal Service empowered to divest itself by contract of the discretion necessary to fulfill its statutory obligations. Congress has not merely given the Postal Service permission to deliver the mails; it has commanded that the Postal Service "shall provide prompt, reliable, and efficient" mail services. The language of this statutorily-rooted obligation is mandatory and unequivocal. Given the background against which Congress acted, in which public employers at all levels of government have traditionally been precluded from bargaining about their basic missions, this mandatory statutory language strongly indicates Congress's intent that the Postal Service, like other public employers, would not be free to contract away the irreducible statutory obligations imposed upon it.

To be sure, when Congress enacted the Postal Service Reorganization Act, it determined that the principles governing the labor-management relations of the Postal

Service were in need of significant reform and that the mechanisms used for structuring labor-management relations in the private-sector should generally be adopted for the Postal Service. At the same time, however, Congress expressed its understanding that the Postal Service would in many ways continue to operate as a traditional agency of government, that postal workers would continue to be government employees, and that the Postal Service and postal workers' bargaining representatives would be exempt from the requirements of the National Labor Relations Act (29 U.S.C. (& Supp. III) 151 *et seq.*) "to the extent [those requirements are] inconsistent with provisions of [the Postal Reorganization Act]" (39 U.S.C. 1209(a)). The provisions of the Act include the mandate requiring the Postal Service to ensure the security and reliability of the mails.

The statutory scheme does not, of course, allow the Postal Service to use its statutory obligation as an excuse for refusing to comply with every arbitration award with which it does not agree. The statute recognizes collective bargaining and arbitration as the preferred means of resolving labor disputes. Accordingly, procedurally, the Postal Service may not bypass an applicable contractual grievance procedure and is bound by the arbitrator's factual findings therein. Moreover, substantively, the Postal Service may invoke its statutory mandate as a basis for challenging an arbitration award only where compliance with the award would seriously impair the core responsibilities of the Postal Service. These procedural and substantive limitations on the Postal Service's resort to the public policy doctrine are necessary to accommodate the statute's commitment to collective bargaining and arbitration. Nevertheless, to preserve the Postal Service's statutory mandate, the courts must also refuse, as they would refuse in any public policy case, to enforce an arbitration award that is fundamentally inconsistent with the Postal Service's irreducible statutory obligation to ensure

the prompt, reliable, and efficient delivery of the mails and, more particularly, to ensure the security of the mails.

The "public policy" question presented to the courts in such a case is, however, different in one important respect from the public policy questions that courts typically face in cases involving private-sector employers and unions. The Postal Service is the expert government agency charged with enforcement of the very public policy that is at issue here. Its determination that compliance with an arbitration award would be inconsistent with its statutory obligations is therefore entitled to some deference. The question for the courts in such a case, as contrasted with the typical public policy case, is not whether the statute is best read as overriding the arbitration award. Rather, the question is whether the statute may permissibly be read to override the award—that is, whether the Postal Service has established that it has reasonably concluded that noncompliance with the award is necessary to achievement of its irreducible statutory obligations. That standard has been satisfied here.

3. Finally, contrary to respondent's suggestion, Mr. Hyde has not been found to have been rehabilitated and thus it was not unreasonable for the Postal Service to conclude that Mr. Hyde's reinstatement would fundamentally impair its statutory obligation to ensure the security of the mails. The arbitrator found that there was a threat of recurrence of misconduct; that Mr. Hyde was not yet ready to return to work; and that, although Mr. Hyde was enrolled in a Gamblers Anonymous program, it is unclear whether he would ever be fully rehabilitated. Accordingly, the Postal Service was entitled to oppose Mr. Hyde's reinstatement on public policy grounds.

ARGUMENT

AN ARBITRATION AWARD ORDERING THE POSTAL SERVICE TO REINSTATE AN EMPLOYEE WHO HAS BEEN DISCHARGED FOR, AND CRIMINALLY CONVICTED OF, FAILING TO DELIVER THOUSANDS OF PIECES OF MAIL IS CONTRARY TO PUBLIC POLICY AND HENCE NOT JUDICIALLY ENFORCEABLE

The court below erred in holding that the arbitration award ordering the Postal Service to reinstate Mr. Hyde should not be set aside. Even if we assume that the award draws its essence from the collective bargaining agreement between the Postal Service and respondent, the award is inconsistent with the paramount public policy requiring that the security of the mails be maintained. This public policy, which is embodied and delimited in the statutes and regulations requiring the Postal Service to ensure that the mails are promptly, reliably, and efficiently delivered, and punishing those who delay or disrupt the mails, is improperly compromised by an arbitration award reinstating to a letter carrier position an individual (a) who has been criminally convicted of failing to deliver thousands of pieces of mail and (b) whom the Postal Service reasonably perceives to pose an undue risk that he may again mishandle the mails if reinstated. The Postal Service's mandate to ensure the reliable and efficient delivery of the mails simply does not allow it to expose the mails to such security risks. Accordingly, it is both reasonable and necessary for the Postal Service to refuse to comply with the arbitration award ordering Mr. Hyde's reinstatement.

A. The Federal Courts May Not Enforce An Arbitration Award That "Compromises" An "Explicit Public Policy" That Is "Well Defined And Dominant" In Existing "Laws And Legal Precedent"

1. The Court has long recognized that the federal statutes regulating our nation's labor policy, including the statutes regulating the labor-management relations of the

Postal Service, evidence a strong commitment to the settlement of labor disputes through arbitral processes. See *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-650 (1986); *Bowen* v. *United States Postal Service*, 459 U.S. 212, 224-226 (1983).[2] The Court has accordingly held that the federal courts "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworkers Int'l Union* v. *Misco, Inc.*, No. 86-651 (Dec. 1, 1987), slip op. 6. See also *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1960). Rather, the Court has said, courts must treat any arbitration award that "draws its essence from the collective bargaining agreement" as the contractual agreement of the parties. *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); see generally *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. at 648-651.

That courts must treat an arbitrator's interpretation of a collective bargaining agreement as the last word on the intent of the contracting parties, however, does not automatically require—or authorize—the courts to enforce every award as rendered by the arbitrator. Even if an award draws its essence from the collective bargaining agreement, the courts have a duty to determine whether the award is consistent with "public policy" before enforcing it. See *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-84 (1982); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960). The Court has long held that "[t]he power of the federal courts to enforce the terms of private agreements is at all times exercised

[2] The Court has not decided whether and, if so, to what extent the statutes regulating the labor-management relations of other federal agencies—specifically, those whose labor-relations are subject to Title 5 of the United States Code—evidence this commitment to settlement of labor disputes through arbitration. Nor need the Court address that question in this case.

subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where judicial enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948) (footnote omitted). The rule against enforcing arbitration awards arising out of collective bargaining agreements because they are contrary to "public policy" is merely an application of this more general doctrine. *Misco, Inc.*, slip op. 12; *W.R. Grace & Co.*, 461 U.S. at 766. See also *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985).

Of course, the federal statutes regulating labor-management relations, like the common law regulating contracts, generally favor the freedom of parties to establish the terms and conditions of their agreements without the intervention of government. *Misco, Inc.*, slip op. 7; see generally *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970); *NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960); *Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959). Accordingly, the public policy exception to the enforcement of arbitration awards, like the public policy exception to the enforcement of contracts generally, is not a license for courts to override private agreements based on their own notions of the public good. A court may not refuse to enforce an arbitration award on the basis of some public policy ascertained by reference to "general considerations of supposed public interests" (*W.R. Grace & Co.*, 461 U.S. at 766, quoting *Muschany* v. *United States*, 324 U.S. 49, 66 (1945)). Rather, the public policy exception "is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant' " in "existing laws and legal precedents" (*Misco, Inc.*, slip op. 12-13 (quoting *W.R. Grace & Co.*, 461 U.S. at 766))—for example, in "the constitution, laws, and judicial decisions of that State and as well the applicable principles of the common law" (*Twin*

City Pipe Line Co. v. *Harding Glass Co.*, 283 U.S. 353, 357 (1931)). See *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 576 (1982); see also *Hurd* v. *Hodge*, 334 U.S. at 34-35 ("The power of the federal courts * * * is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."); cf. *Muschany* v. *United States*, 324 U.S. at 66-67 ("In the absence of a plain indication of [dominant public] policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, this Court should not assume to declare contracts of the War Department contrary to public policy."). When these strict requirements are met, however, courts have a duty to refrain from enforcing an arbitration award as contrary to the public policy of the United States. *W.R. Grace & Co.*, 461 U.S. at 766; *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 83-84.

2. A number of this Court's decisions illustrate the contours of the public policy doctrine. Most recently, in *United Paperworkers Int'l Union* v. *Misco, Inc.*, *supra*, the Court reversed a judgement that had vacated on public policy grounds an arbitration award ordering the reinstatement of an employee whose car on company premises contained traces of marijuana. After ruling that the lower courts had improperly failed to defer to the arbitrator's factual findings and contract interpretation (slip op. 8-11), the Court determined that the lower courts had also erred in their application of the public policy doctrine, both in defining a relevant public policy and in finding it compromised on the facts of the case. First, the Court said that the lower courts had improperly "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs" (*Misco, Inc.*, slip op. 13). The Court agreed that "such a judgment is firmly rooted in common sense," but reiterated that such "a formulation of public policy based only on 'general

considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement" (*ibid.*). Second, the Court held that, even if this "formulaton of public policy is to be accepted, no violation of that policy was clearly shown in this case" (*ibid.*). It found that "the assumed connection between the marijuana gleanings found in [the employee's] car and [his] actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy * * * 'against the operation of dangerous machinery by persons under the influence of drugs or alcohol' " (slip op. 14 (citation omitted)).

By contrast, where compliance with an arbitration award would in fact conflict with federal law, as interpreted by an appropiate agency or court, the Court has said that it will not hesitate to vacate the award. In *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), for example, the Court held that an arbitration award that conflicts with an interpretation of the National Labor Relations Act by the National Labor Relations Board may not be enforced. The collective bargaining agreement in that case required the employer to recognize the union as the exclusive bargaining representative for Board-certified units of employees, expressly including "production and maintenance" employees, but excluding "technical" employees. A dispute arose over whether certain employees in the technical engineering laboratory were performing maintenance work. The Court held that the dispute was arbitrable, rejecting the employer's contention that the representation controversy was within the exclusive jurisdiction of the Board. The Court also ruled, however, that the courts could not enforce the arbitration award if the award conflicted with a subsequent ruling by the Board: "Should the Board disagree with the arbiter, by

ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with the ruling, it would not be liable for damages under [Section] 301" of the statute (375 U.S. at 272). See also *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982) (collective bargaining agreement that conflicts with provision or policy of the National Labor Relations Act, as interpreted by the courts, is unenforceable).

In between *Misco* and *Carey* is *W.R. Grace & Co.* v. *Rubber Workers*, *supra*, which involved an arbitration award ordering the payment of damages to individuals who had been deprived of collectively-bargained seniority rights by a conciliation agreement between the Equal Employment Opportunity Commission (EEOC) and their employer (but not their union), which a district court had order the employer to follow. The Court recognized that the award implicated two "well-defined and dominant" public policies—(a) the policy requiring obedience to judicial orders, and (b) the policy favoring voluntary compliance with the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Court agreed (461 U.S. at 766) that courts may not enforce arbitration awards that would lead persons to disobey injunctions issued by courts acting within their jarisdiction; and it said (*id.* at 770-771) that they may not require persons to comply with arbitration awards that discourage conciliation and cooperation with respect to federal employment discrimination claims. Nonetheless, the Court held that neither of those policies had been sufficiently "compromise[d]" by the arbitration award issued in the case to justify its judicial non-enforcement. The award neither created "intolerable incentives to disobey court orders," since it required only the payment of damages (*id.* at 769), nor undermined "true conciliation between all interested parties," since the union was not party to the conciliation agreement (*id.* at 771).

Misco, Inc., *Carey*, and *W.R. Grace & Co.* illustrate that, while the public policy exception is not a "broad judicial power to set aside arbitration awards" (*Misco, Inc.*, slip op. 13), it is an important restraint on the power of individual parties (and the arbitrators who interpret their agreements) to contravene the Constitution, laws, and legal precedents of the United States. Whatever the precise limits of the doctrine, it is clear that the courts will not enforce an arbitration award that is inconsistent with a policy embodied in a federal statute or precedent, as interpreted by the courts or the agency charged with the law's enforcement. See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974); *McDonald* v. *City of West Branch*, 466 U.S. 284, 290-291 (1984). "[T]he aid of the court is denied, not for the benefit of the [moving party], but because public policy demands that it should be denied without regard to the interests of individual parties." *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 262 (1909). See also *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 77-78, 83-84; *Hurd* v. *Hodge*, 334 U.S. at 34-35; *McMullen* v. *Hoffman*, 174 U.S. 639, 669 (1899).

B. Reinstatement of Mr. Hyde Would Improperly Compromise The Statutorily-Rooted Public Policy Demanding The Security Of The Mails

The question for decision in this case, therefore, has two components: first, whether the arbitration award implicates a "well-defined and dominant" public policy that exists in "law and legal precedents"; and, second, whether compliance with the award—and, therefore, its judicial enforcement—would improperly "compromise" that public policy. We submit that both questions must be answered in the affirmative.

1. As the district court recognized (Pet. App. 11a-12a), an important public policy is implicated by the arbitration award in this case—*i.e.*, the public's vital interest in the security of the mails. Millions depend on the mails every day. Important ideas and information are exchanged through the mails. See *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965) (security of the mails fosters important First Amendment values) Businesses use the mails to conduct many of their transactions. Government relies on the mails to deliver benefits to needy persons, to collect taxes, and to conduct numerous official activities. By express legal authority, courts and litigants rely on the mails for the efficient and fair conduct of the nation's judicial business. See, *e.g.*, Sup. Ct. R. 28; Fed. R. App. P. 3; Fed. R. Civ. P. 5(b), 77(d). Our economic, social, political, and legal systems are premised on the assumption that the mails will be secure. See generally U.S. Const. Art. 1, § 8 (Congress is granted the power "[t]o establish Post Offices and post Roads"); *United States Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 120-122, 123-124 (1981); *Ex parte Jackson*, 96 U.S. 727, 732 (1878).

Congress has recognized and sought to protect the public's special interest in the security of the mails in a variety of ways. In colonial times, Congress authorized the Postmaster General, the first of whom was Benjamin Franklin, to use surveyors—the forerunners of today's Postal Inspectors—to protect the mails. See Act of Mar. 2, 1799, ch. 43, 1 Stat. 733; see generally *United States Postal Service* v. *Greenburgh Civic Assn's*, 453 U.S. at 121. In more modern times, Congress has granted the Postal Service a limited monopoly power over the mails (39 U.S.C. 601) and has imposed upon it "the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people" (39 U.S.C. 101(a)). Specifically, Congress has mandated that the Postal Service "shall

provide prompt, reliable, and efficient services to patrons in all areas * * *" (39 U.S.C. 101(a)) and has instructed that, "[i]n determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail" (39 U.S.C. 101(e)). See also 39 U.S.C. 403(a) ("The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services * * *. The Postal Service shall serve as nearly as practicable the entire population of the United States."); 39 U.S.C. 403(b) ("It shall be the responsibility of the Postal Service * * * to maintain an efficient system of collection, sorting, and delivery of the mail nationwide."). Moreover, to ensure the security of the mails, Congress has imposed a variety of civil and criminal sanctions on those—specifically including Postal Service employees—who delay, disrupt, destroy, or misuse the mails. See 18 U.S.C. 500-503, 1341, 1700-1703, 1708-1709; 39 U.S.C. 5206, 5403, 5604. Significantly, Congress has incorporated the criminal provisions of Title 18 relating to the mails into the Postal Reorganization Act itself. See 39 U.S.C. 410(b)(2).

The Postal Service, in turn, devotes considerable attention (pursuant to statute) to the public's interest in the security of the mails. It runs the Postal Inspection Service, which is actively involved in the investigation of mail delays and disorders. See 39 U.S.C. 404(7), 603, 3003. In addition, the Postal Service levies fines on carriers that unreasonably delay or disrupt the mails. See 39 U.S.C. 5206, 5403, 5604. Moreover, as we have noted, the Postal Service participates in the investigation and criminal prosecution of individuals who are found to have disrupted the mails—including postal service employees. See 39 U.S.C. 410(b)(2). It also imposes a strict Code of Ethical Conduct on its employees. See 39 C.F.R. Pt. 447. Among other things, this Code of Ethical Conduct expressly reiterates

that the "Prohibition against Delay or Destruction of Mail or Newspapers (18 U.S.C. 1703)" (39 C.F.R. 447.91(q)) is "applicable to all employees in the Postal Service" (39 C.F.R. 447.91). It further provides: "[n]o employees shall engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service in addition to any other penalty imposed by or pursuant to statute." 39 C.F.R. 447.25(c).

These statutory and regulatory provisions plainly establish a "public policy' within the meaning of this Court's cases. Like the public policies favoring obedience to judicial orders and voluntary compliance with the requirements of Title VII, which were at issue in *W.R. Grace & Co.* v. *Rubber Workers, supra,* the public interest in the security of the mails is embodied in "existing laws and legal precedent"—*i.e.*, in the statutes requiring the Postal Service to ensure that the mails are "promptly, reliably, and efficiently" delivered. See *United States Postal Service* v. *American Postal Workers Union,* 736 F.2d 822, 825 (1st Cir. 1984); see also *United States Postal Service* v. *Greenburgh Civic Ass'ns,* 453 U.S. at 122-123. And, again like the public policies at issue in *W.R. Grace & Co.* v. *Rubber Workers, supra,* the public interest in the security of the mails is "well-defined and dominant"; the "public interest in the protection of the safety of the mail * * * [is] of great governmental postal service urgency" (*United States* v. *Bunkers,* 521 F.2d 1217, 1219 (9th Cir.), cert. denied, 423 U.S. 989 (1975)), as is further evidenced by the civil and criminal statutes and Postal Service regulations we have described. See also *National Rural Letter Carriers' Ass'n* v. *United States Postal Service,* 637 F. Supp. 1041, 1044 (D.D.C. 1986). In short, there can be no doubt that the public policy at issue here is not one sought to be created by the courts' imposition of their own notions of the

public good; the public policy demanding the security of the mails is firmly rooted in an interrelated series of legislative and administrative enactments.

2. The arbitration award ordering Mr. Hyde's reinstatement improperly compromises this public policy. The mails are not secure when they are placed in the hands of an individual whom the Postal Service reasonably perceives to pose an undue risk that he may mishandle them. The Postal Service could quite properly conclude that Mr. Hyde is such an individual. He failed over the course of a year to deliver more than 3,500 pieces of mail, including Treasury checks on which numerous individuals may vitally depend. In doing so, he violated not merely a work-rule of the Postal Service, but a federal criminal statute. Moreover, he did not attempt to solve the "compulsive gambling" problem that he offered as an excuse for his criminal misconduct until after he had been convicted. And, although he had begun attending Gamblers Anonymous meetings by the time the arbitration award was rendered, the Postal Service did not, at that time, have sufficient basis for confidence that Mr. Hyde would not again grossly delay and jeopardize the mails. Though respondent vigorously attempted to demonstrate Mr. Hyde's rehabilitation, the arbitrator found that "[t]here [was] the threat of recurrence of misconduct," that Mr. Hyde was not yet fit to return to work, and that that arbitrator could not, even in a more general sense, "foretell what the future prospects of [Mr. Hyde's] rehabilitation may yield" (Pet. App. 23a, 22a). In these circumstances, the Postal Service's statutory obligation to ensure the security of the mails precluded it from reinstating Mr. Hyde and exposing the public to the concomitant risk. As the district court stated (Pet. App. 12a), "the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabilitation of a single letter carrier."

Moreover, reinstating Mr. Hyde would seriously compromise the Postal Service's statutory obligations in ways that extend significantly beyond the delays or disruptions of the mails that Mr. Hyde individually might cause. As Chief Justice Rehnquist noted in his opinion granting the Postal Service's application for a stay, compliance with the arbitration award would "seriously impair [the Postal Service's] ability to impress the seriousness of the Postal Service's mission upon its workers" (Pet. App. 30a-31a). In addition, it would undermine public confidence in the Postal Service's dedication to its statutorily-assigned task—and, indeed, in the very security and reliability of the mails. See *Johnson* v. *United States Postal Service*, 756 F.2d 1461, 1466 (9th Cir. 1985) ("the Postal Service was properly concerned about public confidence in the rural mail delivery system"); *Abbruzzese* v. *Berzak*, 412 F. Supp. 201, 204 (D.N.J. 1978), aff'd, 601 F.2d 107 (3d Cir. 1979) ("The public is entitled to place high reliance on the honesty and integrity of postal employees; they handle papers and property of others which are important to sender and addressee. Trust and confidence are essential to the working of the Service."). See generally *Connick* v. *Myers*, 461 U.S. 138, 152, 154 (1983); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 810 (1985).

3. The First Circuit reached basically the same conclusion we urge here in *United States Postal Service* v. *American Postal Workers Union*, 736 F.2d 822 (1984). In that case, the Postal Service discovered that a window clerk in one of its offices had embezzled approximately $4,325.00 in postal service funds. The employee pleaded guilty to violating 18 U.S.C. 500 and received a one-year suspended criminal sentence. When the Postal Service attempted to discharge the employee, the employee's union filed a grievance on his behalf and an arbitrator ruled the Postal Service was without "just cause" to discharge him.

The arbitrator ruled that the Postal Service should simply have transferred the employee to another position in that office. The First Circuit overturned that award, holding that the award improperly compromised the public's interest in the security of the mails. It explained (736 F.2d at 825) that

> putting a postal employee in a job removed from stamps and money does not remove his chances of violating the public trust. Any postal position which handles mail is one entrusted with items of importance and value by the public. * * * If the Postal Service did not have confidence in an employee's trustworthiness[,] it would be, at a minimum, negligent to not keep close watch on him. Such close supervision as might be prudent could well be too costly to be even remotely efficient.
>
> Aside from any considerations bearing directly on [the grievant], we cannot avoid the common sense implications that requiring the rehiring of [the grievant] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.

The same reasoning and conclusions apply here with special force: the only reinstatement available (since the arbitration award was pursuant to an agreement for a bargaining unit confined to letter carriers) was to the position of letter carrier, a position that would require unsupervised handling of the mails on a day-to-day basis.

4. That reinstating Mr. Hyde would be contrary to public policy does not mean that the Postal Service is forbidden to employ as a letter carrier (or as an employee generally) any person who has been convicted of a crime,

even a crime against the mails. Neither the Postal Reorganization Act (39 U.S.C. (& Supp. III) 101 *et seq.*) nor its implementing regulations create a policy barring the employment of ex-convicts. Indeed, the Act expressly states that, "[t]he Postal Service shall follow an employment policy designed, *without compromising the policy of section 101(a) of this title,* to extend opportunity to the disadvantaged and the handicapped" (39 U.S.C. 1003(b) (emphasis added)), which might conceivably include some persons with disorders that once resulted in criminal behavior. To maintain consistency with the policy of Section 101(a), however, any such employment policy would have to ensure the security of the mails. An arbitration award that requires the Postal Service to employ an individual whom it reasonably perceives to pose an undue risk of delaying or jeopardizing the mails does not meet this requirement. Accord *United States Postal Service* v. *American Postal Workers Union,* 736 F.2d at 825. At least where, as here, there has been no clear and unquestionable rehabiliation, the Postal Service has reasonable grounds for concluding that the security of the mails would be threatened. See Pet. App. 22a ("The Arbitrator is not able to foretell what the future prospects of the Grievant's rehabilitation may yield."); *id.* at 23a ("There is the threat of recurrence of misconduct."). Accordingly, public policy requires that the courts refuse to enforce the arbitrator's reinstatement order.

C. Respondent Has Provided No Persuasive Reason For Requiring The Postal Service To Reinstate Mr. Hyde

In its memorandum in opposition, respondent union argued that reinstatement is not legally proscribed, that the Postal Service may validly contract away its authority to decide whether Mr. Hyde should be reinstated, and that the Postal Service has no reasonable grounds for concluding that reinstatement presents a threat to the security

of the mails. As we show below, these arguments are without merit. But, at the outset, we note that, to the extent these arguments rest on concerns that the public policy doctrine not be so broadened as to deter use of the arbitral system as the ordinary means for resolving disputes under the collective bargaining agreement, the Postal Service shares those concerns. The Postal Service is committed to the arbitral process and to relying on it for the resolution of its contractual disputes. In our view, however, this case is no longer a simple contractual dispute. It is now a dispute concerning whether the Postal Service is free to ignore its statutory obligations. Allowing the public policy doctrine to play its essential, albeit carefully circumscribed, role in these rare situations where compliance with an award cannot be reconciled with statutory duties will not undermine either the law's or the Postal Service's commitment to arbitration. See *Misco, Inc.*, slip op. 11-13; *W.R. Grace & Co.* v. *Rubber Workers,* 461 U.S. at 766. Rather, it will respect the constraints that public law—in this case, the statutory scheme defining the Postal Service's mission and obligations—places on contracting parties and thus on the effectiveness of arbitral awards under their contracts. In short, refusing to enforce the award in this case does not deny the arbitral system the full measure of deference it is due. On that note, we turn to respondent union's specific arguments in support of their contrary theme.

1. Echoing the court of appeals (Pet. App. 5a-6a), respondent first argued (Memo. for Resp. 1-2) that the "public policy" exception is inapplicable in this case because there is "no legal proscription" against Mr. Hyde's reinstatement. This argument misunderstands the nature of the Postal Service's statutory obligations as well as the requirements of the public policy doctrine itself.

In contrast to private employers, who generally define their own missions, the Postal Service derives its mission

from statute. The Postal Reorganization Act requires the Postal Service to ensure that the mails are "promptly, reliably, and efficiently" delivered; and, as we have set forth in some detail, the Postal Service is required, as part of this basic mission, to ensure the security of the mails, a statutory imperative which is reinforced by the strong civil and criminal sanctions Congress has imposed on those who cause the mails to be delayed or disrupted. See 39 U.S.C. 101(a), 101(e), 403(a), 403(b), 410(b)(2); see also 18 U.S.C. 500, 1700-1703, 1705-1708; 39 C.F.R. Pt. 447. This statutorily rooted obligation is legally enjoined on the Postal Service and the Postal Service is not free to relinquish it. Nor is it free to bargain its mission away, as a private employer may bargain away its self-selected mission. Thus, contrary to respondent's argument, any Postal Service action, such as compliance with an arbitral reinstatement award like the one at issue here, that fundamentally impedes or threatens the security of the mails, and hence the accomplishment of the Postal Service's irreducible statutory mission, is in fact legally proscribed.[3]

Respondent suggested (Memo. for Resp. 2) that the award is not subject to legal proscription because the statute does not explicitly bar the Postal Service from employing an individual such as Mr. Hyde. But this suggestion begs the question whether Mr. Hyde's reinstatement is inconsistent with the Postal Service's statutory obligations. If the Postal Service has reasonably concluded that Mr. Hyde's reinstatement would indeed pose an undue risk to the security of the mails, reinstatement

[3] This Court has not resolved whether a court may refuse to enforce an arbitration award on public policy grounds in circumstances where the award does not violate positive law or compel unlawful conduct by the employer (*Misco, Inc.*, slip op. 15 n.12). Our argument in this case, that compliance with the arbitration award is inconsistent with the Postal Service's statutory duties, does not require resolution of that question.

would in fact be inconsistent with the statute's explicit requirement that the Postal Service "shall provide prompt, reliable, and efficient" mail services, as understood in light of the statutory and administrative requirements that the security of the mails be preserved. Cf. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. at 272 (arbitration award that is inconsistent with National Labor Relations Act, as interpreted, may not be enforced). The fact that a statutory mandate (or other applicable constraint of public policy) is couched in broad terms that are not self-defining in no way diminishes its force as a statement of public policy. See *W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. at 769, 771 (suggesting that arbitration award would have been unenforceable if the award had created "intolerable incentives to disobey court orders" or had undermined "true conciliation between all interested parties," two policies which the Court derived by interpretion); *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 77-85 (collective bargaining agreement held unenforceable because contrary to Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), two statutes written in broad terms). Indeed, it would be strange if the most fundamental and important statutory constraint on the Postal Service were given less force precisely because of its sweeping scope.

Respondent further suggested (Memo. for Resp. 2) that the arbitration award is not legally proscribed because Mr. Hyde's reinstatement would not subject the Postal Service to judicial sanction. But this suggestion confuses the legal obligations of the Postal Service with the means of enforcing those legal obligations. It seems quite true that no court could order the Postal Service to discharge an employee like Mr. Hyde: No individual would have standing under the provisions of the statute authorizing suit against the Postal Service to challenge the Postal Service's decision not to discharge another person (39 U.S.C.

401(1), 408(b)), and, for reasons that are not pertinent here, Congress has chosen to make the Postal Service's execution of its statutory mandate generally immune from review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (39 U.S.C. 410(a)). The absence of direct judicial sanction, however, does not mean that the Postal Service is free from legal obligations. Congress has expressly commanded that the Postal Service "shall provide prompt, reliable, and efficient" mail services and, more particularly, has enjoined it to protect the security of the mails. These statutory commands, which are in any event enforceable through the appropriations and other congressional oversight processes, are as much legal obligations that the Postal Service is bound to honor as is a judicially enforceable requirement of positive law. See *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 77-86; *United States* v. *Richardson*, 418 U.S. 166, 176-180 (1974). Thus, it does not follow that there is no "legal proscription" against respondent's reinstatement simply because his reinstatement would not subject the Postal Service to judicial sanction.

2. Respondent also argued (Memo. for Resp. 3-10) that the Postal Service is empowered to divest itself by contract of the discretion necessary to fulfill its statutory obligations and, accordingly, that the Postal Service cannot rely on its statutory mandate in challenging the arbitration award at issue here. This argument, however, ignores the Postal Service's statutory scheme and proposes a grossly unbalanced solution to the delicate problem of accommodating the statutorily-rooted commitment to arbitration with the overriding commands of the statutorily-rooted public policy demanding the security of the mails.

a. Congress has not merely given the Postal Service *permission* to deliver the mails in a prompt, reliable, and efficient manner. Rather, Congress has commanded that the Postal Service "*shall* provide prompt, reliable, and

efficient services to patrons in all areas * * *" (39 U.S.C. 101(a) (emphasis added)). Indeed, it has instructed that, "[i]n determining *all* policies for postal services, the Postal Service *shall* give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail" (39 U.S.C. 101(e) (emphasis added)). See also 39 U.S.C. 403(a) (emphasis added) ("The Postal Service *shall* plan, develop, promote, and provide adequate and efficient postal services * * *. The Postal Service *shall* serve as nearly as practicable the entire population of the United States."); 39 U.S.C. 403(b) (emphasis added) ("It *shall* be the responsibility of the Postal Service * * * to maintain an efficient system of collection, sorting, and delivery of the mail nationwide").

The language of these statutory requirements is "mandatory and unequivocal." *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 602 (1981). Having used "the imperative voice" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (footnote omitted)), Congress cannot be understood as having intended that the Postal Service would nevertheless be free to waive its statutory obligations by contract, to reorder the priorities established for it by statute, or to divest itself of the discretion necessary to carry out its statutory mandate. On the contrary, Congress unmistakably conferred upon the Postal Service "a governmental mission which may not be compromised or negotiated away, in whole or in part, at the bargaining table" or in the arbitral process. *AFGE* v. *FLRA*, 730 F.2d 1534, 1539 (D.C. Cir. 1984).

Indeed, in mandating that the Postal Service "shall provide prompt, reliable, and efficient" mail services and, more particularly, that the Postal Service shall secure the mails, Congress acted against a background in which public employers at the federal, state, and local levels traditionally have been precluded from bargaining about their basic mission or from complying with contractual

commitments or arbitration awards that undermine that mission's irreducible core. See Craver, *The Judical Enforcement of Public Sector Grievance Arbitration*, 58 Tex. L. Rev. 329, 333-339, 350-352 (1980); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L. J. 1107, 1108-1111, 1125-1127 (1969); *Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1611, 1684-1696, 1718-1724 (1984). These constraints reflect fundamental differences between public and private employers. First, the legislative assignment of legal power is made exclusively to the public employer, whose governing officials are selected and held publicly accountable in carefully defined ways. Thus, under sovereignty and non-delegation principles, the public employer is not allowed to delegate control over its legal powers and obligations to nongovernmental groups (such as arbitrators) through the bargaining process. See Craver, *supra*, 58 Tex. L. Rev. at 338-341; *Developments*, *supra*, 97 Harv. L. Rev. at 1692-1693); see also *Ridgefield Park Education Ass'n v. Board of Education*, 78 N.J. 144, 163, 393 A.2d 278, 287 (1978) ("the true managers are the people" and "governmental bodies [must] retain their accountability to the citizenry"). Second, public employers are not free to cease providing statutorily-mandated services—*i.e.*, they cannot "lock out" employees. Accordingly, even when employees are barred from striking, public employers are oftentimes less able than private employers to resist unreasonable union bargaining demands and therefore by law are not allowed to make certain contractual commitments. See Wellington & Winter, *supra*, 78 Yale L. J. at 1119-1123.[4]

[4] Cf. *Schneider Moving & Storage Co. v. Robbins*, 446 U.S. 364, 371-372 (1984) (presumption of arbitrability does not apply where party benefiting from contract, such as pension trustee, does not have recourse to economic weapons of strikes and lockouts).

The Postal Service is a public employer that is both entrusted with such carefully delegated governmental powers and confined by such practical constraints on its bargaining powers. See 39 U.S.C. 101, 202, 401, 402, 403. Indeed, Congress has specificially charged a Board of Governors with the obligation to direct "[t]he exercise of the power of the Postal Service" (39 U.S.C. 202(a)) and has expressly provided that any delegations of authority by the Board "shall not relieve [it] of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment" (39 U.S.C. 402). And, of course, the Postal Service's continuing obligation to deliver the mails precludes it from locking its employees out and shutting down its operations altogether. 39 U.S.C. 101. Since Congress has at no time indicated that it views the legal and practical constraints generally confining public employers as any less applicable to the Postal Service, there is no basis for concluding that the Postal Service, any more than other public employers, is free to contract away the irreducible obligations imposed upon it by Congress in mandatory statutory language.

b. To be sure, as respondent noted (Memo. for Resp. 3-7), when Congress enacted the Postal Reorganization Act, it determined that the principles governing the labor-management relations of the Postal Service were in need of significant reform and that the mechanisms used for structuring labor-management relations in the private sector should generally be adopted by the Postal Service. Congress thus authorized the Postal Service to enter into collective bargaining agreements with the representatives of postal workers (39 U.S.C. 1206(a)); approved the use of binding arbitration as a means of resolving contractual grievances and certain other labor disputes (39 U.S.C. 1206(b), 1206(c), 1207); and subjected the Postal Service and its employees' representatives to part (but only part) of the provisions of the National Labor Relations Act, 29

U.S.C. (& Supp. III) 151-169 (39 U.S.C. 1209(a)). In many ways, therefore, the Postal Service is like an ordinary private employer with respect to labor-management relations. Cf. *Bowen* v. *United States Postal Service*, 459 U.S. at 224-226.

Nevertheless, in enacting the Postal Reorganization Act, Congress expressed its understanding that the Postal Service would in very significant ways continue to operate as a traditional agency of government,[5] that postal service workers would continue to be government employees,[6]

[5] Congress established the Postal Service as an "independent establishment of the executive branch of the Government of the United States" (39 U.S.C. 201). It conferred a wide range of governmental powers and attributes upon the Postal Service: The Postal Service exercises the power of eminent domain "in the name of the United States" (39 U.S.C. 401(9)); it promulgates regulations and publishes them in the Code of Federal Regulations (39 U.S.C. 401(2)); it investigates criminal offenses, enforces certain federal laws, levies fines, and enters into cooperative agreements with other federal agencies and other countries (39 U.S.C. 404(7), 407, 408, 410(b)(2), 411, 603, 3003, 5206, 5403, 5604); it is treated as a federal agency for purposes of tort claims, for service of process and rules of procedure, and for compliance with sundry other federal statutes (39 U.S.C. 409(b), 409(c), 410(b)); and its budget is submitted to the Office of Management and Budget and is transmitted to Congress by the President as part of the federal budget (39 U.S.C. 2009).

[6] Postal Service employees, as members of the postal career service, are "a part of the civil service" (39 U.S.C. 1001(b)) and thus participate in various programs established for the benefit of federal employees (see, *e.g.*, 39 U.S.C. 1005(a)(2), (c) and (d), 1006). Moreover, Postal Service employees are subject to the same no-strike provisions as are other federal employees, the same suitability, security, and conduct regulations, the same nepotism rules, and the same withholding and dual-pay regulations (39 U.S.C. 410(b)(1)). In addition, Postal Service employees must swear or affirm their support for the Constitution before entering upon their duties (39 U.S.C. 1011).

Thus, during the debate on the Postal Reorganization Act, it was explained that "employees of the U.S. Postal Service [* * *] would be Federal employees just like their counterparts in [the Department of]

and that only "in general" would labor-management relations of the Postal Service be subject to the requirements of the National Labor Relations Act, because "[c]ollective bargaining in public employment involves factors that differ importantly from those traditionally found in the private sector." H.R. Rep. 91-1104, 91st Cong., 2d Sess. 13, 57 (1970). Congress provided that, in contrast to employers and unions in the private sector, the Postal Service would have to engage in fact-finding and arbitration in cases of bargaining impasse (39 U.S.C. 1207) and that, unlike employees in the private sector, Postal Service employees would have no right to strike (39 U.S.C. 410(b)(1), incorporating 5 U.S.C. 3333, 7311). And, significantly, Congress also provided that the Postal Service and postal workers' bargaining representatives would be exempt from the requirements of the National Labor Relations Act "to the extent [those requirements are] inconsistent with provisions of [the Postal Reorganization Act]" (39 U.S.C. 1209(a))—provisions that include, of course, the mandate that the Postal Service ensure the "prompt, reliable, and efficient" delivery of the mails.

Contrary to respondent's suggestion (Memo. for Resp. 7-8), Section 1001(e) of the statute (39 U.S.C. 1001(e)) in no way authorizes the Postal Service to waive or dilute its fundamental statutory obligations by collective bargaining or arbitration. Section 1001(e) specifies the "management rights" that the Postal Service enjoys—*e.g.*, the right

State, [the Department of Defense] or the Veterans' Administration" (116 Cong. Rec. 19849 (1970) (remarks of Rep. Mize)), and Postal Service workers were repeatedly referred to as "Federal employees" or "government employees" (see, *e.g.*, *id.* at 19847 (remarks of Rep. Henderson); *id.* at 19852 (remarks of Rep. Hanley); *id.* at 22340 (remarks of Sen. Fong); *id.* at 22340 (remarks of Sen. Allen); see generally *id.* at 22334 (remarks of Sen. Ervin) ("it is absurd to say that we are dealing here with a relationship similar to that between a private employer and his employees")).

to hire, promote, transfer, assign, suspend, demote, discharge, and otherwise to maintain the efficiency of the operations entrusted to it—and, as respondent observes, provides that the Postal Service may not exercise those management rights in a manner that is inconsistent with its collective bargaining agreements. But nothing in Section 1001(e) purports to define the subjects that may properly be included in those collective bargaining agreements. Nor does Section 1001(e) suggest that the only limitations on the Postal Service's management rights are the collective bargaining agreements to which the Postal Service is party. Rather, Section 1001(e) states that the Postal Service must exercise its management rights "consistent with * * * applicable laws, regulations, and collective-bargaining agreements * * *." Among the "applicable laws [and] regulations" are the Postal Service's basic mission-defining statutes, including the requirement that it provide "prompt, reliable, and efficient" mail services, and all those statutes and regulations that require protection of the security of the mails. Thus, while Section 1001(e) clearly may be read to authorize the Postal Service to limit its management *rights* by collective bargaining agreements (implemented by arbitration awards), it may not be read to authorize the Postal Service to limit its statutory *obligations* by such an agreement (or award).[7]

c. The statutory scheme does not, however, allow the Postal Service to use its statutory obligations as an excuse for refusing to comply with every arbitration decision with which it does not agree.[8] The commitment to collective

[7] Similarly, a union may not waive either its statutory obligation of fair representation or its members' right (or ability) to choose their collective representative. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326 (1974).

[8] Nor would it be in the Postal Service's long-term interest in successful labor-management relations to attempt to do so. The Postal

bargaining and arbitration as the means for resolving labor disputes is also a public policy specifically embodied in the Postal Reorganization Act (and generally in the laws regulating labor-management relations). See 39 U.S.C. 1206. This statutory commitment to the arbitral process must be given due weight, in both a procedural and a substantive sense, in the definition of the Postal Service's statutory obligations.

Procedurally, the Postal Service may not bypass arbitration where it is properly invoked, even in cases which the Postal Service considers egregious. New facts may emerge and deference is owed the arbitrator's factual findings. See *Misco, Inc.*, slip op. 14-15. The statutory commitment to the arbitral process is sufficiently strong to bind the Postal Service to the arbitrator's factual findings, even in public policy cases. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974) (plaintiff in a Title VII case is not foreclosed by arbitrator's factual findings and court should give them only the weight they appear to be due).

Substantively, the Postal Service's statutory mandate may properly be invoked as a basis for challenging an arbitration award only in cases concerning that mandate's irreducible core. Otherwise, mutually beneficial working relationships with postal service employees' unions could not be maintained and the statute's commitment to collective bargaining and arbitral processes would itself be undermined. Thus, the public policy doctrine must be limited to situations where compliance with the arbitration award would threaten seriously to impair the irreducible duties of the Postal Service—such as ensuring the security and reliability of the mails. See *Port Jefferson Station Teachers Ass'n* v. *Brookhaven-Comsewogue Union Free*

Service has accordingly challenged on public policy grounds only a handful of the thousands of grievance arbitration awards in which it is annually involved.

School Dist., 45 N.Y. 2d 898, 899, 383 N.E.2d 553, 554, 411 N.Y.S.2d 1, 2 (1978) ("Incantations of 'public policy' may not be advanced to overturn every arbitration award that impairs the flexibility of management • • •. Only when the award contravenes a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility, may it be set aside.").

d. In this residual category of cases, however, the Postal Service's statutory obligations will require judicial non-enforcement of the arbitration award. Contrary to what respondent appears to have suggested (Memo. for Resp. 7-10), once an arbitrator's factual findings are given due respect, the arbitral awards arising from the statutory authorization to engage in collective bargaining cannot be allowed to displace completely the Postal Service's duty to comply with its basic statutory obligations, *e.g.*, to see that the mails are promptly, reliably, and efficently delivered and, more specifically, to ensure that the security of the mails is maintained. Rather, since the Postal Service's mission also arises from statute, it must be given appropriate respect—as would be given any public policy of the United States. This statutory policy is as deserving of preservation as is the policy favoring collective bargaining and arbitration. Thus, in those rare instances where the Postal Service raises its statutory mandate as justification for noncompliance with an arbitration award, the courts must decide, as they would decide in any "public policy" case, whether the award is fundamentally inconsistent with the Postal Service's irreducible statutory obligations and thus unenforceable.

This public policy determination cannot, as respondent implies (Memo. for Resp. 7-10), be made with finality by the parties through their contract or by an arbitrator interpreting the parties's contract. More is involved in these

circumstances than the "common law of the shop." See *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (arbitrator who is applying only contractual provisions between private parties has broad leeway to fill in and to elaborate those provisions according to the "common law of the shop"). Rather, public law rights and obligations must also be considered, and the explication of public law rights and obligations is ultimately the tasks of the courts. See *Misco, Inc.*, slip op. 12; *McDonald* v. *City of West Branch*, 466 U.S. 284, 290-291 (1984) (arbitrator does not have expertise to interpret, or authority to invoke, public laws and, accordingly, judicial determination is ultimately required); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744-745 (1981) (same); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 53-58 (same).

The "public policy" question presented to the courts in such cases—*i.e.*, those cases where the Postal Service raises its statutory obligations to justify noncompliance with an arbitral award—is, however, different in one important respect from the "public policy" questions that the courts typically face in cases involving private-sector employers and unions. Here, the employer is also the expert governmental agency charged by Congress with enforcement of the very public policy that is in issue. Indeed, the agency-employer possesses "all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers" (39 U.S.C. 401(10)). Such an agency-employer's determination that compliance with an arbitration award would be inconsistent with that agency's own "public policy" obligations is entitled to some deference from the courts, at least where, as here, the "public policy" invoked is embodied in the statute from which the agency-employer derives its governmental powers and mission—*i.e.*, the Postal Reorganization Act.

Thus, the question for the courts is not simply whether the Postal Service's mandate is best read as overriding the arbitration award. Rather, the question is whether the statute may permissibly be read to override the arbitrator's award, given the arbitrator's factual findings, the Postal Service's prior interpretations of its statutory mandate, the circumstances motivating the Postal Service's present position, and the language and legislative history of the pertinent statutory and regulatory provisions. In other words, if the Postal Service establishes that it has reasonably concluded that noncompliance with a particular arbitration award is necessary to achievement of its irreducible statutory obligations, a reviewing court should refuse to enforce that award. For the reasons explained above, the Postal Service had demonstrated in this case that noncompliance with the award here is required under that standard.

3. Finally, respondent argues (Memo. for Resp. 10-11) that, because Mr. Hyde has been rehabilitated, it is unreasonable for the Postal Service to determine that Mr. Hyde's reinstatement would fundamentally impair its statutory mission of ensuring the security of the mails. But the arbitrator did not find, and the record does not establish, that Mr. Hyde has been rehabilitated. Rather, it is clear that Mr. Hyde enrolled in Gamblers Anonymous and regularly attended sessions only as a mandatory condition of his court-ordered probation. Respondent tried to convince the arbitrator that Mr. Hyde had been rehabilitated, but the arbitrator found that a threat of recurrent misconduct existed and that Mr. Hyde was not yet ready to return to work (even though Mr. Hyde had been attending Gamblers Anonymous meetings for at least six months). Indeed, the arbitrator was unsure whether Mr. Hyde would ever be fully rehabilitated. Whatever the case would have been if the arbitrator had found Mr. Hyde to be rehabilitated, it was entirely reasonable for the

Postal Service to conclude that, in the face of the substantial doubt recognized by the arbitrator, Mr. Hyde's reinstatement would be inconsistent with its statutory duty to ensure the security of the mails.[9] As the district court properly recognized (Pet. App. 12a), the overriding logic of the statutory scheme the Postal Service is charged to effectuate necessarily reflects that " the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabilitation of a single letter carrier."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1988

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[9] Even if relevant, the affidavits filed by respondent (Memo. for Resp. App. 1a-7a) do not materially affect the substantial doubt noted by the Postal Service and the arbitrator. They assert only that Mr. Hyde continued to attend Gamblers Anonymous meetings, that he has not participated in any gambling since the date of the award, and that he has passed a physical fitness examination. While commendable, these assertions do not establish that Mr. Hyde has successfully overcome the problems that led him criminally to delay and jeopardize the mails or that there is not an unacceptably high risk that he would do so again.

APPENDIX

Section 101(a) of Title 39, United States Code, provides in pertinent part:

> The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States * * *. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literacy, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas * * *.

Section 101(e) provides:

> In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

Section 202(a) provides in pertinent part:

> The exercise of the power of the Postal Service shall be directed by a Board of Governors * * *.

Section 401 provides in pertinent part:

> The Postal Service shall have the following general powers:
>
> * * * * *
>
> (2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;
>
> (3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures; [and]
>
> * * * * *
>
> (10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

Section 402 provides in pertinent part:

> Except for those powers, duties, or obligations specifically vested in the Governors, as distinguished from the Board of Governors, the Board may delegate the authority vested in it to the Postmaster General under such terms, conditions, and limitations, including the power of redelegation, as it deems desirable. * * * Delegations to the Postmaster General or committees shall be consistent with other provisions of this title, shall not relieve the Board of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment.

Section 403 provides in pertinent part:

> (a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services * * *. The Postal Service shall serve as nearly as practicable the entire population of the United States.
>
> (b) It shall be the responsibility of the Postal Service * * * to maintain an efficient system of collection, sorting, and delivery of the mail nationwide; * * *.

Section 410(b) provides in pertinent part:

> The following provisions shall apply to the Postal Service:
>
> (1) * * * section 3333 and chapters 72 (antidiscrimination; right to petition Congress) and 73 (suitability, security, and conduct of employees), * * * of title 5, except that no regulation issued under such chapters or section shall apply to the Postal Service unless expressly made applicable;
>
> (2) all provisions of title 18 dealing with the Postal Service, the mails, and officers or employees of the Government of the United States; * * *.

Section 1001(e) provides in pertinent part:

> The Postal Service shall have the right, consistent with section 1003 and chapter 12 of this title and applicable laws, regulations, and collective-bargaining agreements—
>
> (1) to direct officers and employees of the Postal Service in the performance of official duties;
>
> (2) to hire, promote, transfer, assign, and retain officers and employees in positions within the Postal Service, and to suspend, demote, discharge, or take other disciplinary action against such officers and employees;
>
> (3) to relieve officers and employees from duties because of lack of work or for other legitimate reasons;
>
> (4) to maintain the efficiency of the operations entrusted to it;
>
> (5) to determine the method, means, and personnel by which such operations are to be conducted; * * *.

Section 1003(b) provides in pertinent part:

> The Postal Service shall follow an employment policy designed, without compromising the policy of section 101(a) of this title, to extend opportunity to the disadvantaged and the handicapped.

Section 1206(b) provides in pertinent part:

> Collective-bargaining agreements between the Postal Service and bargaining representatives * * * may include any procedures for resolution by the parties of grievances and adverse actions arising under the agreement, including procedures culminating in binding third-party arbitration * * *.

Section 1208(b) provides in pertinent part:

> Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees * * * may be brought in any district court of the United States having jurisdiction of the parties * * *.

Section 1209(a) provides:

> Employment-management relations shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of subchapter II of chapter 7 of title 29 [29 U.S.C. (& Supp. III) 151-169 (National Labor Relations Act)].

Section 1703 of Title 18, of the United States Code provides in pertinent part:

(a) Whoever, being a Postal Service officer or employee, unlawfully secretes, destroys, detains, delays, or opens any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, * * * shall be fined not more than $500 or imprisoned not more than five years, or both.

(b) Whoever, being a Postal Service officer or employee, improperly detains, delays, or destroys any * * * mail or package of newspapers not directed to the office where he is employed * * * shall be fined not more than $100 or imprisoned not more than one year, or both.

39 C.F.R. 447.11 provides in pertinent part:

> (a) This Code of Ethical Conduct is designed to instruct and guide employees entering the Postal Service, and to remind all employees of the conduct expected and required of them in performing their official duties and in their general conduct.
>
> (b) * * * A violation of this Code may be cause for remedial or disciplinary action, including discharge. * * *.

39 C.F.R. 447.25(c) provides:

> No employee shall engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service in addition to any other penalty imposed by or pursuant to statute.

39 C.F.R. 447.91 provides in pertinent part:

> The following statutes are applicable to all employees in the Postal Service:
>
> * * * * *
>
> (q) Prohibition against Delay or Destruction of Mail or newspapers (18 U.S.C. 1703).

U.S. GOVERNMENT PRINTING OFFICE: 1980 O-311-825/5574

RESPONDENT'S

BRIEF

Supreme Court, U.S.
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No. 87-59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

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QUESTION PRESENTED

In light of the arguments set forth in petitioner's brief, respondent submits that the question presented should be stated as follows:

Whether the arbitration award requiring the Postal Service to reinstate Edward Hyde after a lengthy suspension without pay, provided that he enter into a rehabilitation program for compulsive gamblers and abstain from gambling, should be vacated as contrary to public policy based on the Postal Service's contention that Mr. Hyde poses an undue risk to the security of the mail, when it is undisputed that Mr. Hyde satisfied the award's conditions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-59

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory provisions involved in this case are reprinted in the Appendix to petitioner's brief. See 39 U.S.C. §§ 1001(e), 1206(b), 1208(b) and 1209(a). Pertinent excerpts from the Postal Service's published regulations, which were not included in petitioner's Appendix, are set forth in the Supplemental Appendix, annexed hereto.

STATEMENT OF THE CASE

Petitioner United States Postal Service ("Postal Service") and respondent National Association of Letter Carriers, AFL-CIO ("NALC"), have been, at all relevant time, parties to a nationwide collective bargaining

agreement covering all postal employees in the city letter carrier craft.[1] Article 15 of the agreement establishes a typical grievance procedure culminating in third-party arbitration, pursuant to the Postal Reorganization Act of 1970 ("PRA"), 39 U.S.C. §§ 101-5605; see § 1206(b). Article 15, Section 4.A.6 specifically provides that all decisions by the arbitrator are "final and binding." Article 16 provides that Postal Service decisions to discharge employees are subject to the grievance-arbitration procedure; that all discipline against postal employees "should be corrective in nature, rather than punitive"; and that "[n]o employee may be disciplined or discharged except for just cause. . . ."

This case presents an attempt by the Postal Service to vacate an arbitrator's award, issued under the foregoing provisions, requiring it to reinstate an individual letter carrier, Edward Hyde. Mr. Hyde, a sixteen-year Postal Service veteran, was discharged from the Garden City, New York, Post Office in June, 1984, after postal inspectors discovered approximately 3,500 pieces of undelivered mail in his car. The NALC filed a timely grievance protesting the discharge. In September, 1984, while the grievance was pending, Hyde pled guilty to having unlawfully delayed the mail in violation of 18 U.S.C. § 1703(b).

In both the criminal proceeding and the subsequent arbitration it was undisputed that Hyde's admittedly serious misconduct was the direct result of his suffering from severe emotional problems which had culminated in his becoming a compulsive gambler. Accordingly, the district court sentenced Hyde to 18 months' probation,

---

[1] Ten copies of the 1984-1987 agreement between the Postal Service and the NALC have been lodged with the Clerk of the Court by petitioner. As petitioner has correctly noted, this agreement does not differ in any relevant aspect from the agreement in effect during the events at issue in this case.

conditioned on his continuing to seek treatment for his gambling problem.[2]

On April 3, 1985, Arbitrator Arthur Talmadge heard the NALC grievance challenging Hyde's discharge. The Union sought reduction of the penalty based on mitigating circumstances. It stressed that Hyde had been "a sixteen year conscientious Carrier"; that, during the period of time when he delayed mail, he was "emotionally sick" from enduring a series of family losses; and that his conduct had resulted from his compulsive gambling illness. (Pet. App. 19a-20a).[3] The NALC also established that Hyde was attending Gamblers Anonymous meetings and was receiving treatment from a counseling service psychologist. In a report considered by the arbitrator, Hyde's psychologist emphasized that Hyde was "well motivated and conscientious" and that he did not impress the psychologist as "someone who attempts to rob or intentionally interfere with the postal system's normal routines." (*Id.* at 20a n.*). The arbitrator also

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[2] We have lodged with the Clerk of the Court ten copies of the transcript of the November 5, 1984 sentencing hearing, the district court's entire file of the criminal case, and the report and order terminating Hyde's probation. The facts presented in the file and at the sentencing hearing bring the nature of Hyde's misconduct into sharper focus. It appears that Hyde had intended to deliver the mail in his car after the Christmas rush, but he was prevented from doing so when his car, containing the mail, *was stolen in December, 1983, and was not recovered until June, 1984*, a day or so before his arrest. (Transcript of Sentencing Hearing at 3-4). The criminal case file also contains two favorable evaluations from Hyde's psychologist and other supportive correspondence. Prior to imposing sentence, the U.S. Magistrate observed, based on the pre-sentence report and other correspondence, that Hyde was "for most of his life . . . a very responsible fellow" and "a pretty reliable kind of guy." (*Id.* at 6).

[3] References to the Appendices to the Petition for a Writ of Certiorari and to the Memorandum for Respondent shall appear herein as "Pet. App. ——" and "Mem. for Resp. App. ——," respectively.

heard testimony by two representatives of Gamblers Anonymous who supported Hyde. (*Id.* at 21a). None of the evidence was challenged by the Postal Service.

In a written award issued April 12, 1985, the arbitrator found that "[t]he underlying psychiatric problem that led to the offense did not in itself render the employee unfit for further employment." (*Id.* at 23a). He concluded that mitigation of the penalty was warranted and reduced the discharge to a suspension without pay. At the time the award was issued, Hyde had been in non-pay status for at least eight months. However, because the arbitrator was not "*totally* persuaded that the Grievant *presently* has the emotional ability to perform the work in an acceptable manner" (*id.*, emphasis supplied), he ordered that Hyde be placed on a medical leave of absence for an additional sixty days, a period which he authorized the parties to extend. In addition, Hyde was to be reinstated without backpay at the end of that period only if he stopped gambling, attended Gamblers Anonymous meetings regularly, cooperated with its members, and was physically able to return to work. (*Id.* at 23a-24a).

Hyde's sixty-day medical leave ended on June 11, 1985, and was not extended by the parties. (Mem. for Resp. App. at 6a). The record demonstrates that throughout that period he attended Gamblers Anonymous meetings regularly, cooperated with its members, and abstained from gambling. (*Id.* at 6a, 7a). He also attended a fitness-for-duty examination conducted by a Postal Service physician who found him to be physically able to work. (*Id.* at 6a). Thus he fulfilled all the conditions of the award and was entitled to reinstatement. In July, 1985, the Postal Service filed this action to vacate the arbitrator's award, claiming that Hyde's reinstatement would violate public policy.[4]

---

[4] During the pendency of the present action, Hyde has been denied employment repeatedly because he was fired from the Postal Service and because he was a gambler. (Mem. for Resp. App. at 2a). The only job he had been able to secure as of April, 1987, was delivering newspapers for which he earned $80 to $100 per week. (*Id.*). At that income level he could not afford to rent an apartment or even a room in a hotel for any extended period of time and, therefore, was forced to sleep in his car or his employer's offices. (*Id.* at 3a). Despite these hardships, Hyde continued to attend Gamblers Anonymous meetings at least once a week. (*Id.* at 2a).

SUMMARY OF ARGUMENT

I.

A. The arbitrator in this case, without in any way condoning or protecting the unlawful delay of the mail, ruled that the provisions of the USPS-NALC collective bargaining agreement authorized him to reduce the discharge penalty imposed on Mr. Hyde on the basis of legitimate mitigating circumstances. It is undisputed that this award draws its essence from the provisions of the collective bargaining agreement, so that the courts below were bound to enforce the award unless it violates some explicit, well-defined, and dominant public policy. *United Paperworkers Int'l Union, AFL-CIO* v. *Misco, Inc.*, ——, U.S. ——, 108 S.Ct. 364 (1987); *W.R. Grace and Co.* v. *Rubber Workers*, 461 U.S. 757 (1983). In the present case, the Postal Service does not contend that the mitigation principle on which the arbitrator relied is itself inconsistent with public policy. Its sole contention is that the reinstatement of Edward Hyde would violate the statutory requirement that the Postal Service ensure the security and reliability of the mail because the Service has "reasonably" concluded that there is an "unacceptably high" risk that Hyde would again mishandle the mail.

The NALC readily acknowledges that the statutory requirement that the Postal Service reliably deliver the mail, 39 U.S.C. § 101(a), does represent an explicit and important national policy. But aside from this one point, the Postal Service's claim cannot be reconciled with the

analytic framework set out in *Misco*. The Court's decision there establishes that an arbitrator's findings of fact are binding on the employer, the union, and the courts, even for purposes of a public policy inquiry. *Misco* additionally requires an employer invoking the public policy doctrine to demonstrate that the arbitrator has made findings which clearly show that the reinstatement of an individual employee would violate the public policy upon which the employer relies.

Arbitrator Talmadge did not make the requisite findings here. To the contrary, he specifically found that Hyde's compulsive gambling disorder did not render him unfit for duty. Moreover, the evidence before the arbitrator shows that Hyde engaged in misconduct only during the period in which he was engaged in uncontrolled gambling and was not receiving treatment. The arbitrator's decision reflects a judgment that the risk of future misconduct by Hyde would be sufficiently reduced if Hyde continued his Gamblers Anonymous treatment and abstained from gambling as required by the award. Under *Misco*, that judgment " 'and all that it connotes' " is now binding. 108 S.Ct. at 370 quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

Moreover, the Postal Service's argument that Hyde poses a threat to the mails presumes that once Hyde is restored to its employment rolls, his supervisors would have no choice but to allow him to resume unsupervised handling of the mail. This assumption is not supported by the record in this case. The arbitrator's award leaves Hyde's superiors free to supervise or monitor him closely on the job; to assess his present condition based on first-hand observation; to reassign him to non-delivery duties; and, if necessary, to discharge him again. Moreover, under the Postal Service's published regulations, management may require Hyde to submit to a psychiatric examination to evaluate his fitness for duty.

The Postal Service's additional claims that compliance with the award would adversely affect its ability to maintain discipline among Hyde's co-workers and would undermine public confidence are not supported by any evidence in the record. Insofar as the award does not let Hyde's actions go unpunished—he was, after all, criminally convicted and suspended without pay for at least ten months—there is no sound basis for the Postal Service's present speculation that the award may inspire misconduct by any of Hyde's co-workers. The Postal Service's concerns about public confidence do not reflect any explicit, well-defined or dominant public policy rooted in laws and legal precedent.

B. The Postal Service seeks to substitute for *Misco's* "clear showing" requirement an alternative approach to the public policy doctrine based on its status as a public employer. The Postal Service claims that under the PRA it has discretion to determine that an award is inconsistent with its irreducible statutory obligations. It further asserts that the courts must accord deference to such determinations. This approach, however, is wholly inconsistent with the text, structure, and legislative history of the PRA. The PRA requires that the Postal Service be treated, for present purposes, the same as an employer in the private sector. Thus, this case must be decided solely within the framework of *Misco*.

II.

In the alternative, even if the Court were to accept the Postal Service's characterization of the facts, the appropriate response would be to remand this case to the arbitrator for further fact-finding concerning Hyde's fitness for duty in light of his treatment during the medical leave. *Misco* explicitly recognizes that a court may remand for further proceedings when it seems appropriate. If the Court agrees with petitioner that the question of Hyde's fitness at the time the award was issued was so uncertain as to preclude enforcement of the award, law and logic dictate that this matter be remanded to the arbitrator for definitive resolution. Moreover, even if

the Court concludes that public policy precludes Hyde's reinstatement as a letter carrier under any circumstances, it should nonetheless remand the case to permit the arbitrator to fashion an alternative award. The arbitrator could reasonably order the Postal Service to offer Hyde reinstatement to an alternative position or, at the very least, he could award Hyde compensatory damages. As the Court recognized in *W.R. Grace*, "[c]ompensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy." 461 U.S. at 769 n.13.

ARGUMENT

I. THE ARBITRATION AWARD REQUIRING THE POSTAL SERVICE TO REINSTATE EDWARD HYDE IS NOT CONTRARY TO PUBLIC POLICY AND MUST BE ENFORCED

A. There Is No Basis for Vacating the Award Under *United Paperworkers v. Misco*

1. *Introduction*

The Court of Appeals for the District of Columbia Circuit correctly held that Arbitrator Talmadge's award is enforceable. The Postal Service's present argument fails to satisfy the requirement set out in *United Paperworkers Int'l Union, AFL-CIO* v. *Misco, Inc.*, —— U.S. ——, 108 S.Ct. 364 (1987), that a violation of public policy be clearly shown from the factual findings and conclusions of the arbitrator.

Before addressing the merits of the Postal Service's argument, however, we would stress three points which underscore the narrowness of the present dispute. First, the Postal Service does not claim that Arbitrator Talmadge misinterpreted the collective agreement. Without condoning or protecting delay of the mail by postal workers, the arbitrator ruled that a discharge penalty could

be reduced on the basis of legitimate mitigating circumstances. This approach is manifestly consistent with the USPS-NALC agreement which provides that no employee may be discharged except for "just cause"; that discipline be "corrective" in nature rather than "punitive"; and that arbitrators may award reinstatement to employees who have been discharged. Thus, this award "draws its essence from the collective bargaining agreement," and the courts below were "bound to enforce the award" unlesss it "violates some explicit public policy." *W.R. Grace and Co.* v. *Rubber Workers*, 461 U.S. 757, 764, 766 (1983); accord *Misco*, 108 S.Ct. at 370, 373.

Second, the Postal Service does not contend that any law or public policy precludes it from entering into a collective bargaining agreement authorizing arbitrators to reduce disciplinary penalties on the basis of mitigating circumstances. The doctrine of mitigation has been firmly established in both American arbitral practice[5] and civil service adverse action procedure.[6] As the Court noted in *Misco*:

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[5] See F. Elkouri and E. Elkouri, How Arbitration Works 668 (4th ed. 1985); M. Hill, Jr. and A. Sinicropi, Remedies in Arbitration 104-05 (1981). A recent statistical analysis of arbitral practice in discharge cases revealed that arbitrators reduced the company's original penalty about a third of the time. Fogel, *Court Review of Discharge Arbitration Awards*, 37 The Arbitration Journal 22, 23 (June, 1982). Another analysis of discharge awards concluded that "in over 60 percent of the cases . . . [t]he issue was whether discharge was a fair and reasonable penalty in view of the circumstances of the case." Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, Critical Issues in Arbitration, Proceedings of the Tenth Annual Meeting of the National Academy of Arbitrators 31 (J. McKelvey ed. 1957), *quoted in* Fogel at 24.

[6] The Merit Systems Protection Board (MSPB) has independent authority to consider whether a chosen penalty is appropriate. *Parsons* v. *United States Dep't of the Air Force*, 707 F.2d 1406, 1409 (D.C. Cir. 1983); *Douglas* v. *Veterans Admin.*, 5 United States Merit Systems Protection Board Reporter ("M.S.P.R.") 280, 305-306 (1981). *Douglas* specifically requires the MSPB to consider

> Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*" 363 U.S. at 597, 80 S.Ct. at 1361 (emphasis added).

108 S.Ct. at 372. See also, *Local 2578, Am. Fed'n of Gov't Employees* v. *General Services Admin.*, 711 F.2d 261, 265-66 (D.C. Cir. 1983).

Third, the Postal Service acknowledges that no law or public policy prohibits the application of the mitigation

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the employee's potential for rehabilitation in weighing mitigation. *Id.*

In reviewing discipline cases, the MSPB has not hesitated to reduce penalties for even very serious infractions. It has reinstated a postal employee who had hidden 1,314 pieces of mail in his locker, noting his "remorse and potential for rehabilitation," *Robinson* v. *United States Postal Service*, 28 M.S.P.R. 681, 688 (1985); an employee who took 4 boxes of deliverable mail, noting that the employee "received no personal gain," *Taylor* v. *United States Postal Service*, 29 M.S.P.R. 350, 352 (1985); an employee who misappropriated $7,884.62 of postal funds to support a gambling habit and was sentenced to a year's probation, noting that he was attending Gamblers Anonymous, *Lampack* v. *United States Postal Service*, 27 M.S.P.R. 468, 469 (1985); an employee who embezzled, *Goode* v. *Defense Logistics Agency*, 31 M.S.P.R. 446 (1986); an employee who misappropriated binoculars contained in undeliverable mail, *Smith* v. *United States Postal Service*, 31 M.S.P.R. 508 (1986); an employee who converted a ten dollar money order, noting that he did not use the money for personal gain, *Ballenger* v. *United States Postal Service*, 21 M.S.P.R. 741, 743 (1984); an employee who was repeatedly tardy, noting that he had suffered from post-traumatic delayed stress syndrome but had a favorable prognosis, *Villanueva* v. *United States Postal Service*, 26 M.S.P.R. 534, 536-37 (1985).

doctrine in favor of employees who have been convicted of crimes affecting mail security. (Pet. Br. 23-24). For example, although the criminal statute under which Hyde was convicted, 18 U.S.C. § 1703(b), applies exclusively to "Postal Service officer[s] or employee[s]," it does not mandate loss of employment as a sanction. Thus, the policy embodied in § 1703(b) is "vindicated . . . by a criminal conviction and the judicial imposition of a penalty," *Local 453, Int'l Union of Elec. Workers* v. *Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963) (Marshall, J.), and does not preclude reinstatement of an employee-violator.

The *only* claim advanced by the Postal Service is that the reinstatement of Edward Hyde, the individual, to the employment rolls of the Garden City Post Office poses such risks to the security of the mail as to violate the PRA's requirement that the Postal Service reliably deliver the mail. As we now show, this argument fails under *Misco*.

2. *The Misco Criteria*

Misco establishes the analytic framework for assessing the sufficiency of the Postal Service's claim. There, an employee, Isiah Cooper, was discharged for allegedly possessing and using marijuana on plant premises. Cooper had been apprehended by the police in the back seat of someone else's car in the company parking lot with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray. The arbitrator held that the evidence of the automobile incident was not sufficient to prove that Cooper had personally smoked or possessed marijuana on company property. The arbitrator also ruled that additional evidence that marijuana gleanings had been found in Cooper's car was inadmissible because this evidence was not known to the company at the time it decided to discharge Cooper. The district court vacated the award, and the Fifth Circuit affirmed, holding that the evidence against Cooper required that the

award be set aside as contrary to the public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol. *Misco, Inc.* v. *United Paperworkers Int'l Union*, 768 F.2d 739, 743 (5th Cir. 1985).

This Court reversed the Court of Appeals' judgment as inconsistent with *W.R. Grace*. The Court stressed that "our decision in that case does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy." *Misco*, 108 S.Ct. at 373. The Court held that "[a]t the very least" two basic criteria must be satisfied before an award may be vacated. *Id.* at 373-74 and 376 (Blackmun, J., concurring). First, the "alleged public policy must be properly framed under the approach set out in *W.R. Grace*"—that is, the policy must be "explicit," "well-defined," and "dominant," and "is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* at 373. Second, "the violation of such a policy *must be clearly shown* if an award is not to be enforced." *Id.* at 373-74 (emphasis supplied). Neither of these criteria was satisfied in *Misco*.

The Court's reasoning with respect to the second requirement demonstrates the proper approach for determining whether a conflict between an award and an appropriate public policy has been "clearly shown." At the outset, the Court stressed that the arbitrator's findings of fact were binding on the reviewing court even if those findings were "improvident" or "silly." *Id.* at 370-71. Accordingly, the lower courts were bound to accept the arbitrator's conclusion that Cooper's presence in the automobile was insufficient to prove that he had possessed or used marijuana on company property. The Court then held that speculation about Cooper's use of drugs, based on the undisputed evidence of marijuana in his car, was not a sufficient basis for holding that his reinstatement would violate a public policy against on-the-job drug use.

> [T]he assumed connection between the marijuana gleanings found in Cooper's car and Cooper's actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the Court of Appeals "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F.2d at 743. *A refusal to enforce an award must rest on more than speculation or assumption.*

Id. at 374 (emphasis supplied). But most significantly, the Court held that it was beyond the authority of the lower courts, even for purposes of a public policy inquiry, to conclude that *in the future* Cooper would endanger plant safety by using drugs. Rather, this was a task for the arbitrator alone.

> To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been *or would be* under the influence of marijuana while he was on the job and operating dangerous machinery is *an exercise in fact-finding about Cooper's use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award.* The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems. *Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task.*

Id. (emphasis supplied); see also *id.* at n.11. Moreover, the fact that the arbitrator had failed to perform this task was insufficient to permit the assertion of a public policy claim. "If additional facts were to be found, the arbitrator should find them in the course of any further effort the Company might have made to discharge Cooper for having had marijuana in his car on company premises." *Id.*

In sum, speculation that Hyde may be a recidivist if he is reinstated is not a sufficient basis for vacating the award. The *Misco* approach requires an employer invoking the public policy doctrine to demonstrate that the arbitrator has made findings which clearly establish that the reinstatement of an individual employee would violate the public policy upon which the employer relies. See *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353, 358 (1931) (a contract "may not be held invalid, in the absence of a *clear showing* that some *definite* public detriment will *probably result* from its performance") (emphasis supplied). The precise question now before the Court is whether the Postal Service has satisfied this burden here.

3. *The Postal Service's Failure to Satisfy the Misco Criteria*

(a) The Postal Service's basic claim is that the reinstatement of Hyde would compromise the public policy demanding the security of the mails. (Pet. Br. 17). Specifically, it contends that "there is an undue risk that he may mishandle" the mail if reinstated. (*Id.* at 21). This claim must be rejected under *Misco.*

Arbitrator Talmadge did not make any findings which affirmatively show that Hyde, having satisfied the conditions of both his probation and the award, nonetheless would be likely to repeat his misconduct if he is reinstated. To the contrary, after reviewing the testimony of Hyde's two sponsors at Gamblers Anonymous, along with written reports by a psychologist who treated Hyde, the arbitrator found that Hyde's compulsive gambling disorder "did not in itself render [him] unfit for further employment." (Pet. App. 23a). To assure that Hyde would have the "emotional ability to perform the work in an acceptable manner," the arbitrator required him to take an unpaid sixty-day medical leave of absence and further conditioned Hyde's reinstatement on his continuation of therapy and abstinence from gambling. (*Id.* at 23a-24a). Moreover, the record of the arbitration proceedings shows that Hyde delivered the mail at the Garden City Post Office for fifteen years prior to the period at issue without incident. (*Id.* at 17a, 19a). The Postal Service has never suggested that Hyde mishandled the mail during his initial fifteen years of employment. Hyde's on-the-job difficulties arose only during the period in which he was engaged in uncontrolled gambling and was not receiving treatment. Thus, the conditions imposed by the award, which were added to the conditions of Hyde's probation, were reasonable safeguards against further misconduct.[7]

Petitioner's argument proceeds from an entirely unfair characterization of the award: *viz.*, that the arbi-

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[7] This conclusion is further buttressed by the undisputed events which took place after the issuance of the award. Hyde's declarations in the proceedings below establish that he regularly attended Gamblers Anonymous meetings at least once each week and totally abstained from any gambling since April, 1984. (Mem. for Resp. App. at 2a). Concurrently, from September, 1984, through April 20 1987 (the date of the last declaration), he held down a seven-day-per-week job as a newspaper deliverer. *Id.*

The evidence here is also supported by clinical studies confirming both the treatability of compulsive gambling in general, and the efficacy of Gamblers Anonymous sessions in particular. See Politzer, Morrow and Learey, *Report on the Cost-Benefit/ Effectiveness of Treatment at the Johns Hopkins Center for Pathological Gambling*, 1 Gambling Behav. 131 (1985) ("Pathological gambling not only ranks amongst the most expensive illnesses afflicting society, but also is the least expensive to treat and *the most 'cureable' when treated*" (emphasis supplied)); Russo, Taber, McCormick and Ramirez, *An Outcome Study of an Inpatient Treatment Program for Pathological Gamblers*, 35 Hospital and Community Psychiatry 823, 827 (1984) ("[T]he results of this study . . . lend support to the contention that pathological gambling is a treatable disorder. . . . A finding of clinical importance is the significant relationship between abstinence from gambling and participation in either professional follow-up therapy or self-help groups." (referring to Gamblers Anonymous groups)).

trator recognized such "substantial doubt" concerning Hyde's future performance that it was "reasonable" for the *Postal Service itself* to conclude that the risk that he would mishandle the mail again is "unacceptably high." (Pet. Br. 38-39 & n.9). This argument is based on two sentences in the award—repeatedly cited by petitioner—stating: (1) "[t]he Arbitrator is not able to foretell what the future prospects of the Grievant's rehabilitation may yield" and (2) "[t]here is the threat of recurrence of misconduct." (Pet. App. 22a-23a). But all the arbitrator intended by these observations was to recognize that some small risk exists in any situation involving the employment of an individual who has a psychiatric problem. This is clear from the arbitrator's citation of the arbitral award in *Samuel Bingham Co.*, 67 Lab. Arb. (BNA) 706, 708 (1976) (reinstating an epileptic), for the proposition that

> [s]afety is desirable of course but to attempt to create an absolutely riskless society is to place an impossible burden on the public . . . . [I]f we refuse in the name of *safety* to take the small risk, *safety* becomes callousness and indifference.

(Pet. App. at 23a, emphasis in original). In this context the arbitrator's decision to reinstate Hyde obviously indicates that *in the arbitrator's judgment* the risk of future misconduct by Hyde would be reduced sufficiently if Hyde continued his treatment and abstained from gambling as required by the award. Under *Misco*, such a judgment call by an arbitrator is binding. 108 S.Ct. at 374.[8] (See Part I.B., *infra*).

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[8] Even if the award is viewed as uncertain or ambiguous on the issue of future misconduct by Hyde, such uncertainty or ambiguity would not satisfy *Misco's* requirement that a violation of public policy be shown clearly by the arbitrator's findings, rather than a matter of "speculation or assumption." 108 S.Ct. at 374. *Cf. W.R. Grace*, 461 U.S. at 764; *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 598 (1960) ("mere ambiguity in the

In any event, the Postal Service's argument that Hyde poses a threat to the mails necessarily presumes that once Hyde is restored to its employment rolls his supervisors will have no choice but to allow him to resume "unsupervised handling of the mails on a day-to-day basis." (Pet. Br. 23). This assumption, however, is not supported by the record in this case. Nothing in Arbitrator Talmadge's award would preclude Hyde's supervisors from attempting to assess his present condition or from supervising or monitoring him closely on the job. Contrary to petitioner's representation (*id.*), a substantial portion of the work of the letter carrier bargaining unit is performed in the post office under close supervision, and many letter carriers have no delivery duties at all. But even if Hyde were immediately assigned to a letter carrier route, the Postal Service could assign a supervisor the task of accompanying him on the route to assess his ability to work. Such supervisory oversight would afford absolute protection to the security of the mails, regardless of Hyde's condition.[9] If that experience indicated that Hyde was not emotionally fit to deliver mail, his supervisors could, without violating the award, assign him to other duties or, if necessary, discharge him again. See *National Post Office Mailhandlers* v. *United States Postal Service*, 751 F.2d 834, 842-843 (6th Cir. 1985) (Stewart, J.) (reinstatement award mooted by subsequent events warranting discharge).

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opinion . . . is not a reason for refusing to enforce the award"); *Douglas Aircraft Co.* v. *NLRB*, 609 F.2d 352, 354-55 (9th Cir. 1979); *International Union of Dist. 50* v. *Bowman Transp., Inc.*, 421 F.2d 934, 936 (5th Cir. 1970).

[9] Even assuming, as petitioner suggests (Pet. Br. 23), that assigning such a supervisor to Hyde would be costly, the imposition of such a cost on the Postal Service cannot possibly be characterized as a "clear" violation of any "explicit," "well-defined," or "dominant" policy embodied in the PRA. Rather, the added expense would simply be an incremental addition to the cost of complying with the collective bargaining agreement.

Moreover, the Postal Service, in attempting to evaluate Hyde's condition, would not have to rely solely on the observations of supervisors. Postal Service regulations expressly confer upon management the authority to require Hyde to submit to a medical examination to determine his fitness for duty, USPS *Employee and Labor Relations Manual* § 864.3; *Personnel Operations Handbook* (Handbook P-11) § 343.1 (Supp. App. A-3, A-4, *infra*), which, as arbitrators have recognized, could include a psychiatric examination.[10] Its disability retirement regulations establish specific procedures for management-initiated psychiatric examinations to determine whether an employee is fit for duty, see *Employee and Labor Relations Manual* § 568.32 (Supp. App. A-1). If a psychiatrist's evaluation were to indicate that Hyde is unfit to perform the duties of a letter carrier, management could initiate disability retirement procedures, if Hyde is eligible (see 5 U.S.C. § 8337); or assign him to other duties (see USPS-NALC collective bargaining agreement, Article 13, USPS *Personnel Operations Handbook* § 342.4 (Supp. App. A-4); or place him in inactive status or discharge him again (see note 10, *supra*). On the other hand, if the psychiatrist's prognosis were favorable there would be no reason to doubt Hyde's ability to perform (or, at the very least, no basis for characterizing the risk of future misconduct as "unacceptably high"). In either event, enforcement of the award would not jeopardize the security of the mail.

[10] Postal Service arbitrators have upheld management's authority to discharge or otherwise deny active duty to emotionally disturbed employees on the basis of psychiatric examinations. We have lodged with the Clerk of the Court 10 copies each of three awards from two cases illustrating this principle. In *United States Postal Service* and *National Ass'n of Letter Carriers*, Case No. W4N-5T-D-37609 (1987) (Leventhal, Arb.) ("Award") and *id.* (Supplemental Award dated February, 1988), the Postal Service sought to discharge a letter carrier with a history of alcohol and drug problems for threatening his supervisor. The arbitrator reduced the discharge to a suspension without pay—relying, in part, on a favorable prognosis submitted by the grievant's therapist—while specifically emphasizing that the Postal Service could require the grievant to take a psychiatric fitness for duty examination if it had concerns as to his ability to return to work. (Award at 22; Supplemental Award at 2 and 6). See also *United States Postal Service* and *National Ass'n of Letter Carriers*, Case No. NC-E-4422 (1979) (Jensen, Arb.) (upholding management's right to require grievant to go on leave-without-pay for a month pending receipt of a favorable psychiatric report).

Of course, Hyde would certainly have the right to grieve any of the aforementioned management actions. But even if the NALC were to agree with Hyde and appeal that grievance to arbitration, management would have the opportunity to prove, through direct testimony, the precise claim raised here—that Hyde's emotional condition renders him unfit for duty as a letter carrier. This case then is in essentially the same posture as *Misco* when it came before the Court. There the arbitrator had not yet evaluated the likelihood of future on-the-job drug use by Cooper because he had suppressed the evidence of the marijuana gleanings in Cooper's car. Despite this uncertainty, the Court ordered that the award be enforced, recognizing that any dispute concerning the risks to plant safety posed by Cooper's drug use would have to be resolved by the arbitrator in the course of further efforts by the company to discharge him. In the present case, neither management nor an arbitrator have yet had the opportunity to evaluate Hyde's condition, on the basis of either direct observation or psychiatric examination, *after* the sixty day medical leave specified by the award. Here too, enforcement of the award would still permit any dispute concerning Hyde's fitness for duty to be resolved in accordance with the parties' agreed-upon procedures without any jeopardy to the security of the mail. By contrast, a decision to vacate would grant the Postal Service relief on the basis of speculation about Hyde's

condition and his amenability to discipline and treatment—precisely what *Misco* forbids.[11]

(b) The Postal Service also claims that the award will adversely affect its ability to maintain discipline among Hyde's co-workers and will undermine public confidence in the Postal Service. (Pet. Br. 22-23). These claims, which were never advanced in the arbitration proceeding, cannot justify vacating the award.

There is absolutely no evidence in the record to support a finding that enforcement of the award will increase the risk of misconduct at the Garden City Post Office. For example, the Postal Service offered no evidence showing how many employees work in Hyde's office or may be aware of his case.[12] Given the evidentiary vacuum, one can just as easily argue that the Postal Service's refusal to comply with a final and binding ar-

[11] Given the relative ease with which the Postal Service can ensure against the risk of Hyde's future misconduct, its present claim fails to satisfy another essential requirement of the public policy doctrine—that the potential harm to public policy "outweigh[s]" the interests in the enforcement of the contract. *Town of Newton* v. *Rumery*, —— U.S. ——, 107 S.Ct. 1187, 1192 (1987) (citing, *inter alia*, Restatement (Second) of Contracts § 178(1) (1981)). Among the factors to be considered in applying this balancing test are "(a) the parties' justified expectations; (b) any forfeiture that would result if enforcement were denied; and (c) any special public interest in the enforcement of the particular term." Restatement (Second) of Contracts § 178(2). Here, the NALC has an expectation—well-founded in the PRA and case law—in the enforcement of its collective bargaining agreement as interpreted by arbitrators. Moreover, a denial of enforcement here would result in an extreme forfeiture for Hyde—the loss of his career. And beyond these considerations, as we discuss herein, there is a special public interest, reflected in the PRA, in the settlement of Postal Service labor disputes through collective bargaining and grievance arbitration. (See Part I.B., *infra*).

[12] Cf. *Misco*, 768 F.2d at 740 (employer affirmatively established that a "drug and drinking problem" existed among the employees on Cooper's shift to support its public policy claim).

bitration award would undermine employee morale by creating a sense of unfairness and resentment. (See Part I.B.2, *infra*). In any event, the Postal Service's claim concerning the impact of the award on Hyde's co-workers represents precisely the sort of factual issue which should be resolved by an arbitrator chosen by the parties who is "familiar with the [post office] and its problems." *Misco*, 108 S.Ct. at 374; see also *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). In the absence of concrete arbitral findings the Postal Service's argument "improperly assumes [postal worker] misconduct," cf. *Town of Newton* v. *Rumery*, 107 S.Ct. at 1193, and thus, once again, amounts to nothing more than "speculation or assumption." *Misco*, 108 S.Ct. at 374.[13]

Moreover, there is no sound basis for such speculation. "The award does not let [Hyde's] actions go unpunished; rather it subjects [Hyde] to a . . . disciplinary suspension" almost one year in length. *Kane Gas Light and Heating Co.* v. *International Bhd. of Firemen*, 687 F.2d 673, 682 (3rd Cir. 1982) (footnote omitted), cert. denied, 460 U.S. 1011 (1983); see also *Amalgamated Transit Union* v. *Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981). Any employee contemplating an act of misconduct would learn from Hyde's case that he risks not only criminal conviction but potential discharge or, at the very least, a lengthy suspension without pay. Indeed, such an employee would also learn that he may escape discharge only if he is placed on probation, has substantial seniority with a clean record, and can offer convincing proof

[13] In granting petitioner's application for a stay, the Chief Justice did, of course, recognize the Postal Service's interest in impressing the seriousness of its mission upon its workers, but only for purposes of evaluating the "stay equities." (Pet. App. 30a-31a). The Chief Justice did not make a final assessment of the sufficiency of the record to sustain the Postal Service's position on this issue. Nor does his ruling suggest that these claims, if proved, would be a justification for vacating the award.

to an arbitrator that he has suffered from a severe emotional disorder for which he is receiving treatment. In sum, the sad facts of Hyde's case cannot possibly inspire misconduct by Hyde's co-workers. Cf. *International Ass'n of Machinists* v. *Campbell Soup Co.*, 406 F.2d 1223, 1227 (7th Cir.), cert. denied, 396 U.S. 820 (1969); *Wyman-Gordon Co.* v. *United Steelworkers*, 613 F.Supp. 626, 632 (N.D. Ill. 1985).

The Postal Service's claim with respect to the impact of the award on public confidence is likewise not supported by any evidence in the record. For example, no evidence has been presented that either Hyde's arrest or the arbitration award was widely publicized. In any event, there is simply no nexus between the question of public confidence and the policy of ensuring the security of the mail which is the asserted basis for vacating the award. The maintenance of public confidence, in and of itself, cannot be fairly characterized as a "well defined and dominant" public policy derived from "laws and legal precedents." *Misco*, 108 S.Ct. at 374. Rather, like the need to safeguard against the operation of dangerous machinery by employees under the influence of drugs, the Postal Service's claimed need to maintain public confidence may be "rooted in common sense," but it is not the sort of interest "that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement." *Id.*

B. Petitioner's Attempt to Substitute for the *Misco* Criteria an Alternative Approach to the Public Policy Doctrine in Postal Cases—Based on Judicial "Deference" to Its "Reasonable" Determinations—Must Be Rejected

The Postal Service seeks to substitute for *Misco's* "clear showing" requirement an alternative approach to the public policy doctrine based on its status as a "public employer." (Pet. Br. 28-38). This argument begins with the assertion that the mission-defining provisions of

the PRA, 39 U.S.C. §§ 101, 403, impose on the Postal Service certain "irreducible" statutory obligations which cannot be negotiated away. (Pet. Br. 29-30). From this premise, petitioner argues that postal management must retain discretion to determine whether an award is inconsistent with its statutory mandate (even though it freely entered into a collective bargaining agreement, signed by the Postmaster General, that did not reserve such discretion in the grievance procedure). Petitioner further insists that because it is an "expert governmental agency," the courts must accord "deference" to the determination of its managers that "noncompliance with a particular arbitration award is necessary to achievement of its irreducible statutory obligations." (*Id.* at 37-38).

The NALC readily acknowledges that the PRA imposes certain mandatory obligations on the Postal Service which could bar the enforcement of an arbitration award within the framework of *Misco* and *W.R. Grace*. For example, we would not expect the Postal Service to comply with an arbitral decision which required the entire Postal Service to shut down in July and August so that letter carriers could have a summer vacation. But we emphatically reject petitioner's arguments that: (1) the PRA confers upon the Service discretion to reject the conclusions of arbitrators *in discipline cases;* and (2) the Postal Service's managers are entitled to deference from the courts with respect to their evaluation of the risks posed by individual employees.

This theory of public employer discretion has been considered and rejected by the Third Circuit in a post-*Misco* decision. *United States Postal Service* v. *National Ass'n of Letter Carriers, AFL-CIO*, — F.2d —, 127 Lab. Rel. Rep. (BNA) 2593 (3d Cir. 1988). The court concluded that there is "no basis for distinguishing between the postal service and the private sector with regard to the scope of judicial review of arbitration conducted under collective-bargaining agreements."

> [*Misco's*] policies are no less apposite in the context of labor relations in the postal service than in the private sector. Moreover, there is no indication of any statutory intent to remove the postal service collective bargaining framework from general federal labor relations law and policy. Therefore, we conclude that there is no basis for enlarging the scope of review of arbitration awards in the postal service context.

Id. at 2596-97. Moreover, as another lower court has observed, the Postal Service's approach "would make a mockery of the arbitration process because it would, in effect, give the USPS the unfettered right to simply ignore the arbitrator's award." *National Rural Letter Carriers Ass'n* v. *United States Postal Service*, 637 F.Supp. 1041, 1044 (D.D.C. 1986).[14]

The Postal Service's expansive view of its authority is similar to the Navy's position in *Department of the Navy* v. *Egan*, — U.S. —, 56 U.S.L.W. 4150 (U.S. Feb. 23, 1988), that its discretion to deny security clearances to civilian employees is not subject to review by the Merit Systems Protection Board under the Civil Service Reform Act of 1978. As the Court recognized, the decision to deny a security clearance, like the determination of just cause, involves both "an attempt to predict [the employee's] possible future behavior" and a determination of "what constitutes an acceptable margin of error in assessing the potential risk" all of which "must be a judgment call." *Id.* at 4153. The Court held that in matters

[14] Petitioner does seek to limit the public policy exception by suggesting that it may properly be invoked only in cases involving the "irreducible core" of its statutory mandate. (Pet. Br. 35). But the fact remains that neither the PRA nor petitioner's brief sets forth any criteria which distinguish those statutory obligations that fall within this "core" from those which do not. In this connection we note that the PRA requires the Service to provide "prompt," "expeditious," and "efficient" postal service. See 39 U.S.C. §§ 101(a), 101(e), 403(a), 403(b).

involving national security this judgment call is to be made by the Executive Branch on a nonreviewable basis. The Court stressed that (1) "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and security affairs" and (2) the Civil Service Reform Act "does not confer broad authority on the Board to review a security-clearance determination." *Id.* at 4153-54.

In this case—which certainly does not involve national security—the PRA's " 'express language' along with 'the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved,' " *id.* at 4154, quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984), show that in the Postal Service the judgment call necessary to determine whether to permit the continued employment of an employee who has misbehaved is to be made through collective bargaining and grievance arbitration in accordance with the legal principles that prevail in the private sector. This case must be decided solely within the framework of *Misco*.[15]

1. *Text and Structure of the PRA*

The Postal Service's theory of public employer discretion is inconsistent with the labor provisions of the PRA.

[15] The Postal Service's demand for deference here must also be rejected because there is no evidence that any appropriate management officials ever in fact made a determination—based on psychiatric examination or other information—as to whether Hyde was fit for duty after the 60 day medical leave provided by the award. (See pp. 17-19, *supra*). The Postal Service based its position throughout the grievance procedure and the arbitration solely on the argument that Hyde's offense warranted removal and he was not entitled to mitigation. (Pet. App. 15a-17a, 20a-21a). Indeed, the Postal Service did not even take a position on the risks of future misconduct by Hyde in any of the papers that it filed in the district court. See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment.

Those provisions, set out in chapter 12, were intended by Congress generally to "bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 13 (1970) (hereinafter "House Report"). Thus, chapter 12 requires the Postal Service to accord exclusive recognition to labor organizations representing appropriate units of postal employees (39 U.S.C. § 1203); authorizes the Postal Service to enter into collective bargaining agreements with the postal unions providing, *inter alia*, "procedures for resolution by the parties of grievances and adverse actions . . . including procedures culminating in *binding* third party arbitration" (*id.* at § 1206(b), emphasis supplied); and provides for the enforcement of collective bargaining agreements and arbitration awards through suits in the federal courts (*id.* at § 1208(b)). Judicial decisions under § 1208(b)—the jurisdictional basis for suits involving the public policy doctrine—have consistently recognized and applied the same body of legal principles in Postal Service cases that has been developed in private sector cases under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. See *Bowen* v. *United States Postal Service*, 459 U.S. 212, 232 n.2 (1983) (White, J., dissenting); *American Postal Workers Union* v. *United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987). Section 1209(a) further provides that "[e]mployee-management relations" in the Postal Service—unlike in any other federal agency—"shall, to the extent not inconsistent with provisions of this title, be subject to the provisions of subchapter II" of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169.

Under the scheme of the PRA, private sector labor law is displaced by specifically applicable "inconsistent" provisions of Title 39. For example, 39 U.S.C. § 1209(c) prohibits the Postal Service and the postal unions from entering into union security agreements that would otherwise be authorized by Section 8(a)(3) of the NLRA, 29 U.S.C. § 158. Similarly, the PRA prohibits postal workers from exercising the right to strike that is protected by Section 7 of the NLRA, 29 U.S.C. § 157. See 39 U.S.C. § 410(b)(1) incorporating, *inter alia*, 5 U.S.C. § 7311.

However, neither chapter 12, nor any other provision of Title 39, vests postal management with special discretion, not possessed by private employers, to reject arbitration awards. To the contrary, 39 U.S.C. § 1001(e)—the provisions of the PRA most pertinent to the issue raised here—expressly subordinates the Postal Service's most basic management rights, including the right to discharge employees, to the requirements of chapter 12 and collective bargaining agreements. Section 1001(e) reads, in full, as follows:

> The Postal Service shall have the right, consistent with section 1003 and chapter 12 of this title and applicable laws, regulations, and collective-bargaining agreements—
>
> (1) to direct officers and employees of the Postal Service in the performance of official duties;
>
> (2) to hire, promote, transfer, assign, and retain officers and employees in positions within the Postal Service, and to suspend, demote, discharge, or take other disciplinary action against such officers and employees;
>
> (3) to relieve officers and employees from duties because of lack of work or for other legitimate reasons;
>
> (4) to maintain the efficiency of the operations entrusted to it;
>
> (5) to determine the methods, means, and personnel by which such operations are to be conducted;
>
> (6) to prescribe a uniform dress to be worn by letter carriers and other designated employees; and

(7) to take whatever actions may be necessary to carry out its mission in emergency situations.[16]

See *National Post Office Mailhandlers* v. *United States Postal Service*, 751 F.2d at 842.

Section 1001(e) represents a decisive change from the regulations governing postal labor relations prior to the enactment of the PRA. Executive Order 10,988, 27 Fed. Reg. 551 (1962), which covered federal agencies generally, permitted the postal and federal employees unions to negotiate limited collective bargaining agreements. The Executive Order—in language which is the *mirror opposite* of section 1001(e)—expressly preserved the Post Office Department's absolute authority to exercise the same management rights now spelled out in section 1001(e). Compare Exec. Order 10,988, § 7(2)(a)-(f), 27 Fed. Reg. at 554 with 39 U.S.C. § 1001(e)(1)-(5), (7).[17] Significantly (in light of petitioner's arguments

[16] Section 1001(e) is derived from the virtually identically worded Section 206(b) of H.R. 17070, 91st Cong., 2d Sess. (1970), the bill which became the PRA. The section-by-section analysis of the House Report accompanying H.R. 17070 described Section 206(b) as follows:

> Subsection (b) . . . [a]uthorizes the Postal Service to direct employees in the performance of their official duties, to take various personel actions, to maintain the efficiency of the operations entrusted to it, to determine how such operations are to be conducted, and to take whatever actions may be necessary to carry out its mission in situations of emergency. *The exercise of these management rights is made subject to the terms of whatever collective bargaining agreements may have been entered into.*

House Report at 28 (emphasis supplied).

[17] Section 7(2) of the Executive Order provided:

> Management officials of the agency retain the right, in accordance with applicable laws and regulations, (a) to direct employees of the agency, (b) to hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the Government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted; and (f) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

27 Fed. Reg. at 554.

here), the Executive Order also prohibited negotiations with respect to "*the mission of an agency*, its budget, its organization and the assignment of its personnel, or the technology of performing its work." Exec. Order 10,988, § 6(b), 27 Fed. Reg. at 553-54 (emphasis supplied). The Executive Order allowed for third party arbitration solely on an advisory basis permitting management to reject the arbitrator's decision. See *id.* at § 8(b), 27 Fed. Reg. at 554. The substitution of the present sections 1001(e) and 1206(b) of the PRA for the foregoing provisions clearly establishes Congress's intent to eliminate preexisting management prerogatives in favor of a regime in which collective bargaining and grievance arbitration are paramount.[18]

The Postal Service argues that section 1001(e) is inapplicable here because that section restricts the exercise of management's *rights*, whereas here management is under a supposed statutory *obligation* to discharge an employee who presents "an unacceptably high risk" that he will jeopardize the mail. (Pet. Br. at 33-34, 39 n.9). But this position simply begs the question of who is to

[18] See also 39 U.S.C. § 2010, prohibiting the Postal Service from entering into any agreement which restricts "the use of new equipment or devices which may reduce the cost or impair the quality of postal services," *except* for collective bargaining agreements negotiated under chapter 12. This provision grew out of an amendment, originally passed in the House, which would have prohibited the Postal Service from agreeing to union demands restricting the use of new technology. The House-Senate conference subsequently changed this provision to one "which exempts collective bargaining agreements" from the prohibition. H.R. Conf. Rep. No. 1363, 91st Cong., 2d Sess. 88 (1970).

determine whether the risks posed by an individual employee are so high that he must be removed. Under the statutory scheme, where union representatives and management officials disagree over that question, the matter may be presented to arbitration for a "binding" resolution. 39 U.S.C. § 1206(b). Nothing in the statute authorizes management to reject the arbitrator's determination.

The significance of sections 1001(e) and 1206(b) is reinforced by the overall structure of the PRA. Cf. *United States* v. *Fausto*, — U.S. —, 56 U.S.L.W. 4128 (U.S. Jan. 25, 1988). Chapters 10 and 12 of the PRA, coupled with various provisions of Title 5 which are incorporated into the PRA, set forth a comprehensive, detailed scheme regulating Postal Service labor relations. Within this statutory structure are various specific provisions which demonstrate that when Congress chose to set restrictions on the collective bargaining process, or to prohibit the employment of certain categories of postal employees, it did so explicitly. In addition to the prohibitions against union security agreements and strikes, for example, 39 U.S.C. § 1206(a) bars the parties from negotiating agreements that are less than two years in duration. Section 1003(a) prohibits the Postal Service from negotiating agreements under which employees would be paid less than comparable employees in the private sector. Similarly, section 1005(f) establishes a floor for Postal Service "fringe benefits" below which the parties may not negotiate. Section 1005(a)(2) preserves for armed service veterans Title 5's protections for preference eligibles, including the right to appeal adverse actions to the Merit Systems Protection Board in lieu of the grievance procedure. See 5 U.S.C. §§ 7511-14. Section 1005(a)(2) further provides that these protections "shall not be modified by . . . any collective bargaining agreement." Section 7311 of Title 5 prohibits the employment of postal employees who go on strike. Similarly,

5 U.S.C. §§ 7324-25 provide for dismissal when a postal employee is found to have engaged in prohibited political activity.

Given the degree of specificity which characterizes the statutory scheme, "the omission of a provision" affording postal management special discretion to reject arbitration awards issued pursuant to § 1206(b) "is sufficient reason to believe that Congress intended to foreclose" such discretion. See *Block* v. *Community Nutrition Inst.*, 467 U.S. at 347. "The comprehensive nature" of the PRA, "the attention that it gives throughout to the rights of" postal management, employees, and unions, and the fact that it does not provide for the managerial prerogatives now claimed, "combine to establish a congressional judgment" which precludes the Postal Service's present position. *Fausto*, 56 U.S.L.W. at 4131. See also *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981).

In sum, there is no foundation in the text of the PRA for the Postal Service's theory of public employer discretion and deference.

2. *Legislative History*

The legislative history of the PRA further demonstrates that the Postal Service must be treated, for present purposes, the same as employers in the private sector.

The United States Postal Service, the successor agency to the cabinet-level Post Office Department, was created in 1970 by the PRA. See 39 U.S.C. § 201. In enacting the PRA, Congress " 'launched [the Postal Service] into the commercial world,' " so as "to be treated similarly to other self-sustaining commercial ventures." *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 520, 525 (1984). As Senator McGee, Chairman of the Committee on Post Office and Civil Service, explained during floor debates on the PRA:

> Delivering the mail is simply not in the same category of policymaking and program-development as foreign policy, national defense, housing, highway construction, or health and education assistance to State and local governments. It is an essential, business-oriented service. The committee has no intention of establishing any postal system which does not have a direct and continuing responsibility to the people and to Congress, but we do believe that its role can be fulfilled with a greater degree of efficiency if it is removed from the ordinary channels, administrative controls, and legislative restrictions of other agencies in the executive branch.

116 Cong. Rec. 21,709 (1970). See also *id.* at 20,227 (remarks of Rep. Olsen) (stating that the postal reorganization proposal would create a postal service "operated as any other part of the private sector, that is, in the public utility business"); *id.* at 20,226 (remarks of Rep. Udall).

The movement to create a modern, "business-like" Postal Service may be traced back to the infamous "Chicago catastrophe" in October, 1966, when the Chicago post office became so inundated with mail that it stopped functioning.[19] Shortly thereafter, President Johnson appointed the President's Commission on Postal Organization ("Kappel Commission") to conduct a "searching and exhaustive review." See *Kappel Commission Report* at iii. The Commission's report found that "[t]he United States Post Office faces a crisis." *Id.* at 1. The report highlighted several categories of severe problems including "the circumstances of postal employment," *id.* 14-16, and criticized "unproductive labor-management relations" between postal unions and supervisors. *Id.* at 18-22. The Commission concluded that "[m]any of the prob-

[19] See *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* 11-12 (1968) ("*Kappel Commission Report*").

lems" in the area of labor-management relations "stem from [Executive Order 10,988's] exclusion from bargaining of most items bargainable between management and labor in the private sector" and that "[o]ther difficulties stem from [the] provision in the Executive Order forbidding binding third-party arbitration." *Id.* at 20. Accordingly, the Commission recommended that "[t]he limited negotiating opportunities under Executive Order 10,988 must be replaced with full collective bargaining over pay, related benefits and other matters now negotiated in the private sector." *Id.* at 59. With respect to the reform of the existing grievance procedure, the Commission recommended that

> [c]ontracts between the postal unions and management might well provide for binding third-party arbitration of agreed-upon types of grievances arising under the contract. In the private sector such agreements are common. . . . Such agreements usually provide for the arbitration of disciplinary cases, including discharges.

Id.

By 1969, the need for labor reform in the Post Office was recognized by Congress to be a matter of great urgency. Hearings on postal reorganization were held in both houses throughout the year. Members and witnesses warned of growing frustration among postal workers over pay and working conditions which could result in an illegal strike.[20] Numerous bills were introduced provid-

[20] See, e.g., *Postal Labor Relations and Employee Morale: Hearings Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 1 (1969) ("*Hearings on Postal Labor Relations*") (remarks of Rep. Robert N. C. Nix, Chair of the House Subcommittee on Postal Operations) ("In recent years the possibility of a postal strike has grown more ominous each year."); *id.* at 65 (testimony of David Silvergleid, President, National Postal Union) ("Employee unrest is on the rise."); *id.* at 75 (testimony of James Rademacher, President, National Association of Letter Carriers) ("It is of common knowledge that there is explosive unrest within the Postal Estab-

ing for collective bargaining and grievance-arbitration procedures similar to those recommended by the Kappel Commission. See, e.g., H.R. 4, 91st Cong., 1st Sess. (1969); H.R. 11750, 91st Cong., 1st Sess 1969).[21] These proposals were generally supported by both postal union and management witnesses testifying at the congressional hearings.[22]

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lishment today. Recently the Wall Street Journal labeled the unrest 'a live volcano.' There are a number of reasons for the unrest stemming from totally inadequate wages to filthy and crowded working conditions."); *id.* at 98 (remarks of Rep. Charles H. Wilson as acting Chair of the House Subcommittee on Postal Operations) ("If postal management . . . refuses to place management's case before a neutral panel and the courts, they may push all of us from a crisis in the postal office to postal chaos."); *Postal Modernization: Hearings before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 782-83 (1969) (testimony of Francis S. Filbey, President, United Federation of Postal Clerks, AFL-CIO) ("[W]e have people in the Postal Service who are on the verge of walking off the job . . . because they are disappointed, they are frustrated, they know no other way of trying to convince the American public of the justice of their cause.").

[21] As of April 23, 1969, at least 89 bills on postal labor reform had been introduced and were pending. *Hearings on Postal Labor Relations* at 3.

[22] See, e.g., *Hearings on Postal Labor Relations* at 121 (statement of John A. McCart, Operations Director, Government Employee Council, AFL-CIO) (postal reorganization "can offer an invaluable contribution to the morale of postal workers and to the cause of constructive labor management relations"); *Post Office Reorganization: Hearings before the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess., Part 2, 822 (1969); (testimony of former Postmaster General John A. Gronouski) ("I would look for a substantial improvement in postal worker wages and fringe benefits under conditions where both management and workers are equipped with and are prepared to implement effective tools of collective bargaining."); *id.* at 599 (testimony of Lawrence F. O'Brien, former Postmaster General and then co-chair, Citizens' Committee for Postal Reform, Inc.) ("If I did not believe that this legislation was in the best interest of the more than 700,000 postal employees, I simply would not support it. I am convinced that the establishment of the U.S. Postal Service as envisioned in the bill

Among the witnesses was then-Postmaster General Winton M. Blount, who criticized "the labor management structure that exists in the postal system today [as] radically wrong for a major communications enterprise in today's industrial economy." *Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 535-36 (1969). Mr. Blount strongly endorsed pending legislative proposals to grant postal workers "a statutory right to organize collectively and to bargain collectively with management on all of the matters . . . which their neighbors in private industry have long been able to bargain for." *Id.* at 536. Mr. Blount further stressed the importance of "grievance procedures similar to those that have come to be accepted as a commonplace in the private sector."

> This system has worked very well in American industry generally. Disputes over layoffs, disciplinary actions, and a variety of other matters claimed to be in violation of collective bargaining agreements are processed to a final resolution fairly and expeditiously. I see absolutely no reason why the advantages of such procedures should be denied to the Postal Service.

Id. at 536-37.

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would, in fact, mean better wages, better working conditions, better fringe benefits, better promotional opportunities, better physical surroundings in which to work.").

It is interesting to note that one witness, W.V. Gill, Director of the Office of Labor Management Relations of the Civil Service Commission, did criticize proposals to give individual employees the right to invoke arbitration on grounds identical to petitioner's argument here, *i.e.*, the "law establishes the official responsibility of an agency head to make the decisions, and I see difficulties with having a private person's award override the decision of those officially given that responsibility." *Hearings on Postal Labor Relations* at 117. But even Mr. Gill acknowledged that "if this arbitration were agreed [to] by the management and the union, I would see no problem. Because the management of the department would be agreeing that the subject of [the] grievance is one on which it could accept a private arbitrator's decision." *Id.* at 114.

Postmaster General Blount's emphasis on collective bargaining and grievance procedures was echoed by President Nixon. In a message to Congress, the President recommended "[t]otal reform of the nation's postal system" to include

> for the first time in history, true collective bargaining in the postal system. Postal employees in every part of the United States will be given a statutory right to negotiate directly with management over wages and working conditions. A fair and impartial mechanism—with provision for binding arbitration—will be established to resolve negotiating impasses and disputes arising under labor agreements.

Message from the President of the United States (May 27, 1969), *reprinted in* 115 Cong. Rec. 13,881-82 (1969).

Despite the Administration's support, none of the 1969 postal reorganization bills was passed into law. The PRA was finally enacted in 1970 in direct response to a nationwide work stoppage by postal employees which occurred in March. See House Report at 3. The strike, involving 200,000 postal workers, "spread from New York to Philadelphia and to the Pacific Coast and brought the nation's mail to a halt, forcing the President to activate troops to alleviate a national crisis." Kennedy, *The Postal Reorganization Act of 1970: Heading Off Future Postal Strikes?* 59 Geo. L.J. 305, 318 (1970) (footnote omitted). As Congress later recognized, the work stoppage represented the culmination of "legitimate grievances that had contributed to the cumulative frustration among postal employees." House Report at 3.

At the conclusion of the strike, administration officials and representatives of the postal unions and the AFL-CIO negotiated an agreement that resulted in recommendations to the Congress. The first phase of this agreement called for a six percent wage increase for postal workers retroactive to December 27, 1969. Congress

promptly enacted legislation providing the increase which was signed into law by the President on April 15. Pub. L. No. 91-231 (1970); House Report at 3. On April 16, the postal unions and the Postmaster General executed a final agreement calling for legislation that would, *inter alia*: "requir[e] collective bargaining over all aspects of wages, hours, and working conditions including grievance procedures, and in general, all matters that are subject to collective bargaining in the private sector." *Id.* at 57. The parties also agreed to a draft postal reform bill which was introduced the same day as H.R. 17070. See House Report at 3-4. President Nixon immediately endorsed the April 16 agreement and the proposed bill.

> The negotiators have agreed that there should be a statutory framework for collective bargaining in the postal establishment resembling that of private industry.
>
> * * * *
>
> I propose that the new United States Postal Service be empowered to engage in collective bargaining with recognized employee organizations over wages, hours, and working conditions generally, with negotiating impasses being finally resolved, if necessary, by binding arbitration.
>
> * * * *
>
> In addition to wages and hours, matters that are subject to collective bargaining would include such things as grievance procedures [and] final and binding arbitration of disputes. . . .

Message from the President of the United States Relative to Postal Reform (Apr. 16, 1970), *reprinted in* House Report at 51, 53.

Within one week following the agreement, the Post Office and Civil Service Committees of both the House and Senate held hearings to consider H.R. 17070 and other pending postal reorganization bills. See House Report at 4; *Postal Modernization: Hearings on S. 3513*

Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. Part 2 (1970). At the Senate Committee hearings, Postmaster General Blount explained that the proposal for collective bargaining patterned after the private sector was intended to reduce the likelihood of illegal work stoppages.

> The relations between the Postal Service and its employees would be profoundly influenced, under the proposed legislation by a collective bargaining system patterned in most respects on that which has long prevailed in the private sector.
>
> * * * *
>
> These provisions should, in my opinion, reduce the likelihood of illegal work stoppages. Willful disregard of the law is abhorrent to all thoughtful Americans, but free people cannot be governed, in the final analysis, unless they consent to be governed. If the law that prohibits strikes by Government employees is to be effective, it must find general acceptance among the employees themselves; and that acceptance is far more likely to be achieved, in my opinion, where the employees know that their Government, acting as an employer, will treat them fairly. Postal employees would have that assurance under the jointly-sponsored legislation that this committee is considering today.

Id. at 1261.

On May 19, 1970, the House Committee issued its report recommending the enactment of H.R. 17070. The report specifically stressed the need for collective bargaining and the application of private sector labor law to the Postal Service.

> Although the needs for postal reform are as interrelated as they are manifold, certainly no single need is more insistent than that for reform of the labor-management structure. Events of last March, however deplorable they may be, have finally established that a basic change in postal labor relations is overdue. Although contemporary labor relations in the private sector of the national economy have not been free of problems, they add up to a triumphant success as compared with those in the Postal Service. Generally speaking, H.R. 17070 would bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all of those matters—including wages and hours—which their neighbors in private industry have long been able to bargain for.

House Report at 13-14. On June 3, 1970, the Senate Committee favorably reported a postal reorganization bill similar to H.R. 17070, recommending "the enactment of the collective bargaining agreement for rank-and-file employees" executed by the Postmaster General and the postal unions so as to "provide for true collective bargaining on all issues in the postal service." S. Rep. No. 912, 91st Cong., 2d Sess. 7 (1970).

After the issuance of the committee reports, the postal reorganization bills were debated at great length on the floor of both Houses. These debates show that Congress viewed the labor provisions of the PRA as representing an historic reform, pursuant to which postal workers, unlike the employees of any other agency, would have the same collective bargaining rights as workers in the private sector. As Representative Udall, one of the floor managers of the PRA, put it:

> [O]ur new postman . . . will be able, for the first time, to collectively bargain for his wages, benefits, and working conditions with management. No other Government employee will have such opportunities.
>
> With the singular exception of the right to strike, our new postal employee will be identical to his counterpart in the private sector in this respect.
>
> It is vital that this aspect of the postal reform bill be understood. We are truly creating a new kind of

> Federal employee, embodying him with the protection of many regular civil service provisos, while giving him collective bargaining—with binding arbitration as his last resort—identical to the private enterprise employee.
>
> • • • •
>
> The collective bargaining agreement we speak of in this section is historic. It sets a new standard for Federal employ[ee]-labor relations which should reap benefits for employee and employer alike. We have established a system which should allow the employees to enter this new era with renewed vigor and a determination to make the Postal Service one of the finest careers a man can aspire toward.

116 Cong. Rec. 20,229-30, 27,604-05 (1970).[23] The debates over both the PRA and the earlier pay legislation also show that Congress intended collective bargaining and postal reorganization to achieve several goals: better pay and working conditions for postal workers;[24] improvements in morale and efficiency;[25] and prevention of future strikes.[26] But most significantly, the debates

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[23] See also 116 Cong. Rec. 19,845 (1970) (remarks of Rep. Dulski); *id.* at 19,849 (remarks of Rep. Rosenthal); *id.* at 19,856 (remarks of Rep. Conte); *id.* at 20,203 (remarks of Rep. Brasco); *id.* at 20,240 (remarks of Rep. Button); *id.* at 20,241 (remarks of Rep. Bush); *id.* at 27,602 (remarks of Rep. Derwinski); *id.* at 27,603 (remarks of Rep. Steiger); *id.* at 22,055 (remarks of Sen. Javits).

[24] See 116 Cong. Rec. 20,206 (1970) (remarks of Rep. Fulton); *id.* at 22,320 (remarks of Sen. Hatfield); *id.* at 22,339 (remarks of Sen. Javits).

[25] See 116 Cong. Rec. 11,087 (1970) (remarks of Rep. Esch); *id.* at 19,850 (remarks of Rep. Reid); *id.* at 27,603 (remarks of Rep. Hogan); *id.* at 21,423 (remarks of Sen. Percy).

[26] See 116 Cong. Rec. 10,799 (1970) (remarks of Sen. McGee) ("[O]ne of the new ways to achieve management-labor settlements without strikes at the Government level [is] to set up free and unfettered collective bargaining processes."); *id.* at 10,804 (remarks of Sen. Goldwater and Sen. Pastore); *id.* at 21,717 (remarks of Sen. Fong); *id.* at 22,311-12 (remarks of Sen. Tower).

reflect a clear understanding—even by those who continued to characterize postal workers as "Government employees"[27]—that under the provisions of the pending postal reorganization bill, private sector law would govern postal labor relations in all areas that were not covered by a specific statutory exception. As Representative Mize, observed in the very remarks cited by petitioner:

> All these considerations have led me to conclude that employees of the U.S. Postal Service under this bill would be Federal employees just like their counterparts in State or DOD or the Veterans' Administration. Perhaps my conclusion is self-evident and without need of proof, but it becomes important when we consider certain relevant provisions of the postal reform bill.
>
> *The bill provides that the general labor law of the United States, that is the general labor law governing relations between management and labor in the private sector, will apply to the postal service—except that postal employees will be without the right to strike.*

Id. at 19,849 (emphasis supplied). Indeed, even those with misgivings about collective bargaining understood that private sector law would apply.

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[27] Petitioner's brief cites to six passages from the debates to buttress the argument that Congress, in passing the PRA, still considered postal workers to be more "like" other governmental employees than workers in the private sector. (Pet. Br. 32 n.6). At least two of these passages simply make non-substantive references to postal workers as "Federal employees" or "Government employees" in contexts that are entirely irrelevant to petitioner's argument. 116 Cong. Rec. 19,852 (remarks of Rep. Hanley); *id.* at 22,340 (remarks of Sen. Fong). The other references are to comments made by proponents of a specific provision—ultimately enacted as 39 U.S.C. § 1209(c)—to prohibit the negotiation of union security agreements in the Postal Service. These opponents of "compulsory unionism" sought to support their position by arguing that postal workers would remain government employees.

> I have expressed misgivings about extending to Federal civil service employees all of the labor-management provisions of the National Labor Relations Act including the Taft-Hartley and Landrum-Griffin Acts.
>
> While the bill specifically prohibits the employees from having the right to strike we do permit negotiations in areas where we have never had negotiations before, with binding arbitration as the final authority—not the postal officials or the Congress.

Id. at 19,847 (remarks of Rep. Henderson).

In sum, there is no basis in the legislative record for attributing to Congress an intention, wholly unexpressed in the text of the PRA, to preserve for postal management special discretion to reject the determinations of arbitrators, as suggested by petitioners. The history of the 1970 postal reorganization overwhelmingly supports the proposition that Postal Service arbitration awards are to be enforced in accordance with the same principles that prevail in the private sector. This case, therefore, should be decided solely within the approach set out in *Misco*.

II. IN THE ALTERNATIVE, THE COURT SHOULD REMAND THIS CASE TO THE ARBITRATOR IF IT CONCLUDES THAT THE AWARD MAY NOT BE ENFORCED

Even if the Court were to accept the Postal Service's characterization of the facts, there would still be no basis for vacating the award in its entirety. Rather, the appropriate response would be to remand this case to the arbitrator for further fact-finding. A final resolution of this case in the Postal Service's favor would be entirely premature because there has been no evaluation of Hyde's condition by an arbitrator after the conclusion of his medical leave.

Misco explicitly recognizes that "[t]he court . . . has the authority to remand for further proceedings when

this step seems appropriate." 108 S.Ct. at 372 n.10. See also *Oil, Chem. and Atomic Workers* v. *Union Oil Co.*, 818 F.2d 437, 442-43 (5th Cir. 1987) (remanding reinstatement award to permit arbitrator to consider evidence of grievant's post-award drug use); *Young Radiator Co.* v. *International Union, UAW*, 734 F.2d 321, 325-26 (7th Cir. 1984) (remanding reinstatement award for determination of whether grievant's admission of theft constituted "just cause" for discharge under the collective bargaining agreement). Accordingly, if the Court agrees with petitioner's contention that the question of Hyde's fitness was so uncertain at the time the award was issued as to preclude enforcement of the award, law and logic dictate that this matter be remanded to the arbitrator for a definitive resolution.

Moreover, even if the Court concludes that public policy precludes Hyde's reinstatement as a letter carrier under any circumstances, it should nonetheless remand the case to permit the arbitrator to fashion an alternative award. See, e.g., *Hyde Park Community Hosp.* v. *Allied Services Div.*, No. 87-C-1315, slip op. at 7 (N.D. Ill. Dec. 23, 1987) (available on LEXIS) (upholding reinstatement award but remanding for reconsideration of specific sanction, violative of public policy, denying grievant's right to hold union office for one year). For example, the arbitrator could reasonably order the Postal Service to offer Hyde reinstatement to a position where he would not present any threat to the security of the mail or, at the very least, he could award damages sufficient to compensate Hyde for the loss of his contractual right to employment with the Postal Service. Cf. *Maxfield* v. *Sinclair Int'l*, 766 F.2d 788, 795-96 (3d Cir. 1985); *Fitzgerald* v. *Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980). The latter remedy would be appropriate under the holding in *W.R. Grace*, where the Court recognized that through the payment of damages an employer could satisfy its obligations under a collective bargaining

agreement while avoiding a potential violation of public policy. *W.R. Grace*, 461 U.S. at 767-70, 769 n.13. An award of damages in this case would similarly cause no harm to the security of the mail. Instead, it would further "the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored." *W.R. Grace*, 461 U.S. at 771.

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, this case should be remanded to the arbitrator.

Respectfully submitted,

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MARCH, 1988

SUPPLEMENTAL APPENDIX

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Part 568.32 of the USPS *Employee and Labor Relations Manual* provides:

568 Management Initiated Disability Retirement Procedures

* * * *

.32 Psychiatric Examination

.321 Requirements. A psychiatric examination may be ordered if:

a. There is a request for a psychiatric examination based on the below stated circumstances:

(1) The employee's supervisor (or other manager familiar with the employee's job performance) decides that the employee's behavior has been of a nature that suggests possible mental or emotional illness. In consultation with the medical officer (or contract physician) the supervisor may recommend that a psychiatric examination be included as part of the fitness-for-duty examination; or

(2) The medical officer (or contract physician) based on medical observations made during a fitness-for-duty examination recommends a psychiatric examination; and

b. At least two members of a three-member panel of postal officials, consisting of the employee's supervisor, the Director of Employee and Labor Relations (or designee) and the medical officer agree that a psychiatric examination is warranted. If a medical officer is not available, the file should be forwarded to a conveniently located medical officer for review and opinion as to whether a psychiatric examination is warranted.

.322 Procedures. If a psychiatric examination is to be ordered:

a. Employee Names Representative. Appointment of a representative for the employee is required. Employees may name their own representative at any time.

b. Employee Refuses to Name Representative. If the employee does not name a representative voluntarily, a management official urges the employee to do so before a fitness for duty psychiatric examination is ordered by the Medical Officer.

c. Management Appoints Representative. If the employee persists in not naming a representative, management appoints one to receive copies of all notices, determinations, decisions and other written communication issued to the employee under these procedures. Management may choose a member of the employee's family, union officer, veteran's service officer, or an employee not under the supervision of the affected employee's supervisor.

d. Employee Notified. The employee is notified in writing to report for the examination as indicated in 568.32[3].

e. Employee's Objection to Named Psychiatrist. The employee who objects to the psychiatrist named by the medical officer is requested to submit the names of 3 to 5 medical board-certified psychiatrists to whom the employee would be willing to report. The Medical Officer then selects a psychiatrist from the list and management arranges for an examination.

f. Information Available to Psychiatrist. All available information pertinent to the employee's possible health problem is given to the psychiatrist at the time the examination is scheduled.

g. Information Available to Licensed Physician. The Medical Officer makes available a full report of the medical evidence in the employee's file (including a copy of the reported behavior irregularities or evidence of unsatisfactory service) *only to a licensed physician, named in writing for that purpose by the employee or his representative.*

h. Documenting Information. All instances of alleged behavioral deficiencies on which the decision to order a psychiatric examination was based are documented in the event the employee refuses to cooperate. This lay evidence may serve as the basis for an agency-filed application for disability retirement in the case of an emotionally disturbed employee.

i. Restriction. Management may not review medical records. Management bases its decisions on the final opinion of the medical officer once that official has had an opportunity to evaluate information provided by management and the psychiatric examination.

.323 Sample Letter. The letter in Exhibit 568.323 is intended only as an example of the kind of notice management might give to an employee.

[Sample letter omitted]

Part 864.3 provides:

864.3 Fitness for Duty (See Handbook P-11, 343.)

864.31 A fitness-for-duty examination is required in determining whether an employee is able to perform the duties of the position because of medical reasons, i.e., disability, occupational/nonoccupational injury, or illness.

864.32 Management can order fitness-for-duty examinations at any time and repeat, as necessary, to

safeguard the employee or coworker. Specific reasons for the fitness-for-duty should be stated by the referring official.

864.33 A specific test or consultation may be required in the judgment of the examining medical officer. The indications will be documented as part of the report.

864.34 In cases of occupational injury or illness, the division/MSC Injury Compensation Control office may request an examination in the course of monitoring an injury compensation case. (See 547.3.)

Parts 342 and 343 of the USPS Personnel Operations Handbook (Handbook P-11) provide, in pertinent part:

342 Return to Duty After Extended Illness or Injury

* * * *

342.4 Assignments

Installation heads have the authority to assign any employee returning to duty to an environment away from situations that may have a direct bearing on the conditions which caused the inability to work. They also have the authority to provide useful work for the returning employee during a rehabilitation period, but must be guided by the terms of any applicable collective bargaining agreement.

* * * *

343 Fitness for Duty Medical Exam

343.1 Authority to Administer

Fitness for duty examinations are always performed by a USPS medical officer or contract physician. If necessary, the medical officer or physician may obtain a consultative specialist opinion from a local

source. The region must be requested to designate a medical officer or contract physician for this purpose if one is not available.

343.2 Cost

Fitness for duty examinations are taken at the direction of the Postal Service at no cost to the employee. This includes any travel expenses incurred.

REPLY

BRIEF

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-59

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE, PETITIONER

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our opening brief, we first demonstrated (at 11-17) that a federal court may not enforce an arbitration award that improperly "compromises" or "conflicts" with an "explicit public policy" that is "well defined" and "dominant" in existing "laws and legal precedents." We then showed (at 17-39) that the arbitration award at issue in this case improperly "compromises" and "conflicts" with such a "well-defined" and "dominant" "public policy": The Postal Service is legally obligated to ensure that the mails are "promptly, reliably, and efficiently" delivered, and the Postal Service cannot comply with that legal obligation when it is required to place the mails in the hands of an individual such as the grievant, Edward Hyde, who has been criminally convicted of failing to deliver more than 3500 pieces of mail and who poses an undue risk of again removing the mails from their authorized stream. Respondent and its amici provide no convincing answers to these arguments.

1. Respondent first suggests (Br. 8-22) that, under the standards articulated by this Court in *United Paperworkers Int'l Union* v. *Misco, Inc.*, No. 86-651 (Dec. 1, 1987), the arbitration award requiring reinstatement here cannot be held contrary to public policy and must be enforced. This suggestion is in error.

In *Misco*, the Court reversed a judgment that had vacated on public policy grounds an arbitration award ordering the reinstatement of an employee whose car on company premises contained traces of marijuana. The Court found that the lower courts had improperly "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs" (slip op. 13). Moreover, the Court further found that, even if this "formulation of public policy is to be accepted, no violation of that policy was clearly shown in this case" (*ibid.*). The Court explained that "the assumed connection between the marijuana gleanings found in [the employee's] car and [his] actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy * * * 'against the operation of dangerous machinery by persons under the influence of drugs or alcohol' " (*id.* at 14 (citation omitted)). The Court added that "[a] refusal to enforce an award must rest on more than speculation or assumption" by a federal court; that the question whether this employee "had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery" is factual in nature and thus for an arbitrator to decide; that an arbitrator's finding, "as a factual matter[,] that [the employee] could be trusted not to use [drugs] on the job,

* * * could not [be] upset [by a federal court] * * * because of its own view that public policy about plant safety was threatened"; and that where, as there, an arbitrator orders the employee "to be reinstated in his old job or in an equivalent one for which he was qualified," the reinstatement order may be vacated only if it is "clear from the record that [the employee] would pose a serious threat to the asserted public policy in every job for which he was qualified" (*id.* at 14-15 (footnotes omitted)).

That the arbitration award here must be set aside as contrary to public policy follows straightforwardly from the Court's discussion in *Misco*. As respondent candidly concedes (Br. 5-6), there is a "well-defined" and "dominant" "public policy" in existing "laws and legal precedent" against which the arbitration award in this case may properly be tested: As noted in our opening brief (at 18-21), the public has a vital interest in the security and reliability of the mails, and Congress has accordingly mandated, through a series of civil and criminal statutes, that the Postal Service shall provide "prompt, reliable, and efficient services to patrons in all areas" and otherwise ensure the sanctity and integrity of every piece of mail.[1] Moreover, in contrast to the situation in *Misco*, the arbi-

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[1] See also H.R. Rep. 1674, 82d Cong., 2d Sess. 2 (1952) ("the thing being protected here is more the sanctity and integrity of the United States mails than it is the property value of individual pieces of mail"); *ibid.* ("It can hardly be said that letters, in the vast number of cases, have any monetary or intrinsic value. The almost incalculable importance of the ideas, messages, and expressions contained in business correspondence, and of the sentiment, joy, or grief contained in personal or family letters cannot be measured in terms of dollars. Therefore, the real gravamen of the offense is the very consequential misunderstanding, disappointment, delay, and grief which interference with the mail may entail, rather than the loss of intrinsic property value in the article of mail itself"); *id.* at 3 ("Historically, the

tration award here clearly "compromises" and "conflicts" with this "well-defined" and "dominant" public policy: Over the course of a year, Hyde failed to deliver more than 3,500 pieces of mail, conduct which resulted in a criminal conviction. Notwithstanding respondent's vigorous attempts to show that Hyde has been rehabilitated, the arbitrator found that Hyde is a compulsive gambler, that he—the arbitrator—could not foretell when, if ever, Hyde would be fully rehabilitated, that Hyde could not return to work for at least 60 days, and that, in all events, there was a threat of recurrence of misconduct. Finally, in ordering Hyde's reinstatement as a letter carrier, the arbitrator did not allow the Postal Service the option of placing Hyde in a position that did not have mail handling responsibilities (since no such letter carrier position exists). Pet. App. 21a-24a. In these circumstances, it is reasonable to conclude that Hyde poses a "serious threat" to the security of the mails (*Misco,* slip op. 15), and that the Postal Service's statutory obligation to ensure the security of the mails thus precludes his reinstatement. As the district court stated (Pet. App. 12a (footnote omitted)), "the mails are simply too important to the country to make them dependent upon the vicissitudes of rehabilitation of a single letter carrier."[2]

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sanctity and integrity of the mail has been a matter long regarded as of the utmost importance. • • • The efficiency and safety of this public service should not be impaired").

[2] Contrary to the argument of the National Council on Compulsive Gambling (Amicus Br. 7-8, 11-12), we do not suggest that the public policy requiring that the security of the mails be ensured precludes the Postal Service from employing as letter carriers individuals who have had a history of compulsive gambling; indeed, as explained in our opening brief (at 23-24), we believe that the Postal Service may employ as letter carriers persons who have been convicted of crimes or who in the past have had serious physical or mental disorders. Nor do

Respondent misreads the arbitrator's award in suggesting (Br. 15-16) that the arbitrator did not find that Mr. Hyde posed a distinct and identifiable risk to the security of the mails. The arbitrator plainly found that Hyde was a compulsive gambler (Pet. App. 21a-22a), that he—the arbitrator—could not "fortell what the future prospects of the Grievant's rehabilitation may yield" (*id.* at 22a), and that "[t]his is indeed a tough decision," because "[t]here is the threat of recurrence of misconduct" (*id.* at 23a). Indeed, the arbitrator was not even convinced that Hyde presently had "the emotional ability to perform the work

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we suggest, as the AFL-CIO suggests (Amicus Br. 10-12), that the submission of "just cause" decisions concerning Postal Service employees to neutral arbitrators offends public policy; we contend only that the Postal Service may not comply with a "just cause" decision that would require it to reinstate to a letter carrier position an individual who the arbitrator has found poses a continuing risk to the security of the mails (because, for example, he has quite recently engaged in misconduct apparently attributable to a compulsive gambling problem for which he has not been fully rehabilitated). The Postal Service's legal obligations preclude it from subjecting the mails to the risks of recidivism and misconduct that the National Council on Compulsive Gambling identifies (Amicus Br. 9-11) and that would be incurred by compliance with such an arbitration award.

The Postal Service's position here is completely consistent with the Merit Systems Protection Board (MSPB) cases that respondent cites (Br. 9-10 n.6). In those cases, the MSPB found that, in light of the evidence presented concerning each employee's infraction, his employment record, and rehabilitative success, reinstatement would not pose an identifiable risk to the sanctity and integrity of the mails. See *Smith* v. *USPS*, 31 M.S.P.R 508, 510-511 (1986); *Taylor* v. *USPS*, 29 M.S.P.R. 350, 352-353 (1985); *Robinson* v. *USPS*, 28 M.S.P.R. 681, 688 (1985); *Lampack* v. *USPS*, 27 M.S.P.R. 468, 470 (1985); *Villanueva* v. *USPS*, 26 M.S.P.R 534, 536-537 (1985); *Ballenger* v. *USPS*, 21 M.S.P.R. 741, 743 (1984). Here, of course, the arbitrator made precisely the opposite factual finding.

in an acceptable manner" (*ibid.*) and thus deferred Hyde's reinstatement for 60 days (*ibid.*). In short, the arbitrator did find that Hyde posed an identifiable risk to the mails.

Respondent similarly errs in suggesting (Br. 15-16, 29-30) that, under *Misco*, the arbitrator's judgment concerning the acceptability of the risk associated with Hyde's reinstatement is binding on the Postal Service. The *Misco* opinion stated only that the question whether there is in fact an identifiable risk of a particular kind of future misconduct by a particular individual is for an arbitrator, and not for the courts, to decide. See slip op. 14-15 & n.11. *Misco* does not suggest that, once that risk is identified, as it was here, the distinct and purely evaluative or legal question whether that identified risk is unacceptably high is also committed to the arbitrator. On the contrary, *Misco* clearly states that " 'the question of public policy is ultimately one for resolution by the courts' " (*id.* at 12 (citation omitted)), and *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. 757 (1983), makes clear that whether an identified risk of future misconduct is unacceptably high is a question of public policy. See 461 U.S. at 766-772 (inquiring whether enforcement of an arbitration award would create "intolerable incentives" to disobey court orders or "inappropriately affect" the public policy favoring voluntary compliance with Title VII); see also *Department of Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988), slip op. 10-11 ("what constitutes an acceptable margin of error in assessing the potential risk • • • must be a judgment call"); *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 655-656 & n.62 (1980) ("determination that a particular level of risk is 'significant' will be based largely on policy considerations"); *id.* at 706 (Marshall, J., dissenting) (same). That principle applies with even greater force where, as here, the legal also

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implicates obligations imposed by statute on an employer.[3]

Indeed, respondent further errs in suggesting (Br. 17-22) that the Postal Service can comply with this arbitration award without compromising its statutory obligation to ensure the "prompt, reliable, and efficient" delivery of the mails. The award requires the Postal Service to reinstate Hyde to his letter carrier position. Though respondent at one point suggests (Br. 17) that some letter carriers do not have *delivery* duties, it does not and cannot dispute that Hyde had such delivery duties or that all letter carriers have either delivery, collection, or routing duties—all of which require handling and possession of the mail. Thus, it is clear that the Postal Service cannot comply with this arbitration award without accepting a distinct risk that the mails will be removed from their proper stream—and its obligation to ensure the security of the mails precludes it from subjecting its patrons to such an identifiable and undue risk.[4]

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[3] The Court has, of course, long held contracts unenforceable on the ground that enforcement would tend unacceptably to induce conduct contrary to public policy. See, *e.g.*, *Crocker* v. *United States*, 240 U.S. 74 (1916) (contingent fee contracts held invalid because of tendency to induce improper solicitation of public officials); *Burt* v. *Union Central Life Ins. Co.*, 187 U.S. 362 (1902) (refusing to enforce life insurance policy where the insured had been executed following his conviction for capital murder because economic interest of beneficiary may color beneficiary's testimony at insured's trial).

[4] The Postal Service cannot responsibly mitigate this risk, as respondent suggests (Br. 17), by assigning a supervisor to stand guard over Hyde and closely supervise his handling of the mails. Even if constant supervision were physically possible, "[s]uch close supervision as might be prudent could well be too costly to be even remotely efficient." *USPS* v. *American Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984). Thus, assigning a supervisor closely to supervise Hyde's handling of the mails would itself "stand[] as an obstacle to the

2. The AFL-CIO, as amicus curiae in support of respondent, takes a slightly different tack. It too concedes (Amicus Br. 3-5, 13-14) that the arbitration award may properly be tested against the public policy requiring that the security and reliability of the mails be ensured; indeed, unlike respondent, it concedes (*id.* at 9-10, 14) that, in

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accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941))—*i.e.*, to the "prompt, reliable, and efficient" delivery of the mails by the Postal Service.

Similarly, while the Postal Service might be able to institute a *new* discharge decision on the basis of a psychiatric examination, as respondent suggests (Br. 18-20), it need not subject Hyde to such an examination in order to invoke public policy as a basis for refusing to comply with the award actually at issue in this case—*i.e.*, an award reinstating a compulsive gambler who the arbitrator could not determine was or would ever be fully rehabilitated and who therefore presents a risk of recurrence of misconduct. Since the arbitrator did not condition Hyde's reinstatement on his successful completion of a psychiatric (as opposed to a physical) examination, the fact that Hyde might (or might not) be able to pass such an examination is irrelevant to the question of the enforceability of this award.

Finally, there is no basis for respondent's suggestion (Br. 20-22) that the Postal Service cannot rely on the adverse effect that Hyde's reinstatement would have on co-workers and public confidence in order to justify invoking public policy as a basis for vacating the arbitration award. These obvious adverse effects of allowing Hyde's return to mail handling do not have to be conclusively documented in the record (see *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 810 (1985)), and the Postal Service does not have to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships [are] manifest before taking action." *Connick* v. *Myers*, 461 U.S. 138, 152 (1983). Of course, impressing the seriousness of the Postal Service's task upon co-workers and the public promotes the same public policy that is promoted by removing Hyde from the handling of the mails—it preserves the integrity and sanctity of the mails. Accord *USPS* v. *American Postal Workers Union*, 736 F.2d at 825; *Johnson* v. *USPS*, 756 F.2d 1461, 1466 (9th Cir. 1985).

view of the arbitrator's factual findings, Hyde's reinstatement would pose a threat to the accomplishment of this public policy. But the AFL-CIO contends (*id.* at 13-19) that, in determining whether this arbitration award so clearly violates public policy that it should not be enforced, the Court must balance the threat to the security of the mails against other public policies—*i.e.*, policies that favor holding parties to their agreements, ensuring that labor-management relations are principally regulated through a regime of contract as opposed to public law, promoting arbitral resolution of labor disputes, and rehabilitating and accommodating ex-convicts and the handicapped. We do not agree.

The public policy question presented in this case concerns whether this arbitration award "conflicts" with *a* "well-defined" and "dominant" public policy (*i.e.*, protecting the security and reliability of the mails), not whether the award happens to promote other public policies at the same time as it produces this conflict (as will always be the case, given the vague and comprehensive nature of the public policies relied upon by the AFL-CIO, especially the policy, in effect, of enforcing arbitral awards). Thus, the common law holds that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if *legislation* provides that it is unenforceable • • •." Restatement (Second) of Contracts § 178, at 6 (1981) (emphasis added). No balancing of public policies is proper where legislatively created policies are at issue. See *id.* § 178 comment a.[5]

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[5] Of course, as the AFL-CIO notes (Amicus Br. 13 & n.4), the common law *also* holds that a promise or other term of an agreement is unenforceable on grounds of public policy if "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." Restatement (Second) of Contracts § 178, at 6 (1981)). But this Court has declined to resolve

To be sure, in determining whether legislation provides that a particular promise or contract term is unenforceable, a court must undertake an interpretive process. Legislation is often written in general terms, and "legislatures seldom address themselves explicitly to the problems of contract law that may arise in connection" with the statutes they are enacting. Restatement (Second) of Contracts § 179, at 16 (1981). See generally *Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 188 (1982) ("Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive."). In such circumstances, in order properly to determine whether there is a "well-defined" and "dominant" public policy against which a contract's terms must be tested, a court must examine all pertinent interpretive materials—including, as explained in our opening brief (at 18-21, 25-27, 28-36, 38), the language and structure of the statute, its legislative history, and the various ends that the legislative scheme seeks to promote. See *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 77-85 (1982); Restatement (Second) of Contracts § 179 comment b (1981); see generally

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whether, under the federal common law applicable to labor agreements, a court may refuse to enforce an arbitration award that does not violate positive law or compel unlawful conduct by the employer (*Misco*, slip op. 15 n.12). Our argument in this case, that enforcement of the arbitration award would be inconsistent with the Postal Service's statutory duties, does not require resolution of that question and, accordingly, does not require the Court to resolve whether, in a case dealing with a public policy not grounded in positive law, a federal court could engage in the AFL-CIO's "balancing of interests" approach. See *Misco*, slip op. 1 (Blackmun, J., concurring) (reserving judgment with respect to whether "a court's authority to set aside an arbitration award on public policy grounds differs from its authority, outside the collective-bargaining context, to refuse to enforce a contract on public policy grounds").

Hendrick Hudson Dist. Bd. of Educ. v. *Rowley*, 458 U.S. at 187-209 (defining "free appropriate public education"); *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 682-693 (1983) (defining when it is "appropriate" to award attorney fees). Having considered the relevant elements in defining the purport of the applicable legislative command, however, a court next asks only whether the arbitration award in issue unduly impedes *the* particular well-defined and dominant public policy it discerned in so construing the statute; it does not double-count those elements by engaging in an additional judicial balancing of public policies. See Restatement (Second) of Contracts § 178 comment a (1981); *id.* § 179 comment b; cf. *Misco*, slip op. 13 (citation omitted) (public policy analysis may not turn on judicial "assessment of 'general considerations of supposed public interests' ").

In any event, it is clear that Congress has considered all of the policies relied on by the AFL-CIO and given first priority to the policy of protecting the security and reliability of the public mails. See generally 39 U.S.C. 101(e) (emphasis added) ("[i]n determining all policies for postal services, the Postal Service shall give the *highest* consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail"). Thus, while Congress authorized the Postal Service "to enter into and perform contracts" (39 U.S.C. 401(3)), including collective bargaining agreements (39 U.S.C. 1206), it also made clear that any such delegations of authority "shall be consistent with other provisions of this title, shall not relieve the Board [of Governors] of full responsibility for the carrying out of its duties and functions, and shall be revocable by the Governors in their exclusive judgment" (39 U.S.C. 402). Similarly, while Congress provided that the Postal Service's labor-management

relations would be regulated principally by a regime of contract as opposed to public law, it did so only "to the extent not inconsistent with [the] provisions of this title" and, of course, other public laws (39 U.S.C. 1209(a), 410, 1001(e)). Likewise, while Congress plainly intended to promote the arbitral resolution of Postal Service labor disputes, it authorized the use of arbitration procedures only for "grievances and adverse actions arising under the agreement" itself (39 U.S.C. 1206(b)); it did not suggest that *non-contractual* disputes could be, much less had to be, resolved through the arbitral process. Finally, while Congress stated that the Postal Service "shall follow an employment policy designed * * * to extend opportunity to the disadvantaged and the handicapped," it also mandated (39 U.S.C. 1003(b)) that the Postal Service do so "without compromising the policy of section 101(a) of this title"—precisely the provision that specifies (39 U.S.C. 101(a)) that "[t]he Postal Service shall have as its basic function the obligation to provide * * * prompt, reliable, and efficient services to patrons in all areas * * *." In short, Congress subordinated each of the interests upon which the AFL-CIO relies to the overriding statutory policy of protecting the security and reliability of the mails.

3. The AFL-CIO and respondent essentially acknowledge this congressional ordering of public policies by their concession (AFL-CIO Br. 14 n.5; Resp. Br. 23) that a court could set aside as contrary to public policy an arbitration award that authorized postal service employees to keep mail addressed to certain parts of the country or that required the Postal Service to shut down in July and August so that letter carriers could have a summer vacation. But they nevertheless contend (AFL-CIO Br. 19-27; Resp. Br. 23) that the congressional ordering of public

policies does not allow the Postal Service or the courts to reject the conclusions of arbitrators in *discipline* cases. This distinction is arbitrary and unfounded.

There is no basis for treating awards rendered in discipline cases any differently from awards rendered in cases dealing with other contract provisions. The statute does not suggest that they should be treated differently. On the contrary, it authorizes binding third-party arbitration "for [the] resolution by the parties of grievances *and* adverse actions arising under the agreement" (39 U.S.C. 1206(b) (emphasis added)); and it does not suggest that any arbitration decisions, much less those in discipline cases, are exempt from the requirements of public law. See 39 U.S.C. 410, 1001(e), 1209(a). Nor do this Court's cases distinguish between arbitration awards relating to a "just cause" provision and arbitration awards relating to other terms of a collective bargaining agreement. Rather, the Court's cases have consistently held that *all* questions of fact and contract interpretation are for the arbitrator (unless the parties specify otherwise), and *all* questions of public policy are ultimately for the courts. See *Misco*, slip op. 6-8, 12; *AT&T Technologies* v. *Communications Workers*, 475 U.S. 643, 648-651 (1986). Finally, it is impossible to distinguish between risks created by disciplinary awards and risks created by arbitration awards relating to other provisions of the contract; in each case, the question is whether the risks imposed constitute a "serious threat" to the prompt, reliable, and efficient delivery of the mails. See *Misco*, slip op. 15.

The AFL-CIO plainly errs in suggesting (Br. 24-25) that discipline cases are different from other cases because arbitrators are uniquely situated to determine whether the risks associated with employment of particular individuals pose a serious threat to the accomplishment of the Postal

Service's statutory obligations. We concede, of course, that such determinations require the exercise of a substantial degree of judgment. But we do not understand why the arbitrator's allegedly unique perspective is limited to discipline cases or, more importantly, why arbitrators are competent or authorized to make judgments about the acceptability of such risks at all. The security of the mails can be put at risk by non-discipline awards as well—for example, by an award that overturns a Postal Service work rule requiring letter carriers to return undelivered mail to the office at the end of a shift. Whether the security risks thereby created are intolerable must be decided by reference to public law considerations (see *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 766-772), and arbitrators are not competent to make the final judgment concerning the degree of risk that the public may legally be forced to assume with respect to the safe and timely delivery of its mails. The "specialized competence of arbitrators pertains primarily to the law of the shop, not [to] the law of the land" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)), as embodied in this particular case in the statutes protecting the mails and directing the operations of the Postal Service. In any event, even if a particular arbitrator were otherwise competent to interpret and apply the public law, and thus to determine the degree of risk that Congress has resolved the public should assume, "he may not have the contractual authority to do so. • • • He 'has no general authority to invoke public laws that conflict with the bargain between the parties.' • • • His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 744

(1981) (citation omitted). Accordingly, he may determine, as here, that, as a contractual matter, there is not "just cause" for discharge (because of mitigating circumstances arguably contemplated by the parties)—even though, as a legal matter, reinstatement of the individual would unduly impair the ability of the Postal Service to ensure the sanctity and integrity of the public mails. In similar circumstances, this Court has said that external authorities such as courts must retain the final say in order to ensure that overriding public interests are properly vindicated. See, *e.g.*, *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964); *McDonald* v. *City of West Branch*, 466 U.S. 284, 290-291 (1984); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 53-58.

The AFL-CIO cries "wolf" in suggesting (Br. 24-27) that empowering federal courts to make these judgments will lead to the destruction of the private arbitration system. As explained in our opening brief (at 25), the Postal Service is committed to the arbitral process and to relying on it for the resolution of its contractual disputes; the Postal Service cannot legally walk away from its employees' collective bargaining representative and, accordingly, it would be against the Postal Service's own long-run self-interest to use its statutory obligations in a way that would impair the system of contractual dispute resolution that the parties have jointly created.[6] Moreover, as also explained in our opening brief (at 34-36), the Postal Service cannot use its statutory obligations as an excuse for re-

[6] As we noted in our opening brief (at 34-35 n.8), the Postal Service has challenged on public policy grounds only a handful of the thousands of grievance arbitration awards in which it is annually involved.

fusing to comply with every arbitration award with which it disagrees, even if it would prefer to do so; the Postal Service can invoke its statutory obligations only where, given the arbitrator's factual findings, the award is one that, if complied with, would seriously impair the irreducible duties of the Postal Service, which relatively few arbitration awards can fairly be said to do.[7] Finally, courts have long been judging under the authority of other laws—such as the antitrust laws and the labor laws—whether particular terms of collective bargaining agreements (and arbitration awards implementing them) create legally unacceptable risks of future harm to well-defined and dominant public policies. See, *e.g.*, *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 77-85; *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 769, 771. Private dispute resolution has not collapsed under the weight of this external review process, and there is no reason to speculate that any more serious results would follow from allowing federal courts to make such judgments in the course of enforcing the public policy requiring that the security of the mails be ensured.[8]

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[7] For example, the Postal Service cannot rely on its statutory obligations to resist compliance with an arbitration award that orders the reinstatement of an individual who has a chronic attendance problem and is likely to have unexcused absences again. Likewise, the Postal Service cannot rely on its statutory obligations to resist compliance with an arbitration award that orders the reinstatement of an individual who has routinely made mistakes in sorting the mail and is likely to do so again. While the actions of both employees reduce the effectiveness of Postal Service operations, they do not remove the mails from the authorized stream or otherwise completely prevent the Postal Service from meeting its irreducible statutory obligations.

[8] Citing a handful of cases, the AFL-CIO argues (Br. 25-27 & nn. 12, 13) that the public policy exception is already causing the arbitral system to unravel at the seams. Given the many thousands of arbitration awards rendered annually, this mere handful of cases provides

4. Respondent next argues (Br. 22-24) that we have attempted to substitute for the *Misco* criteria an alternative public policy analysis based on the Postal Service's status as a public employer and that this attempted substitution is inconsistent with the text, structure, and legislative history of the Postal Reorganization Act (PRA), 39 U.S.C. (& Supp. III) 101 *et seq.* This argument has no merit.

As explained in our opening brief (at 11-17), our argument fits squarely within the *Misco* criteria. *Misco* holds that an arbitration award may not be enforced if it "clearly conflicts" with a "well-defined" and "dominant" "public policy." We have identified such a "well-defined" and "dominant" "public policy"—*i.e.*, the public policy requiring that the security and reliability of the mails be maintained—and have demonstrated that the arbitration award in this case "clearly conflicts" with that policy—*i.e.*, it creates a "serious threat" that the mails will be wrongly removed from their authorized stream. Thus, respondent errs in suggesting that we have attempted to substitute for the *Misco* criteria an alternative public policy analysis based on the Postal Service's status as a public employer; and, accordingly, its lengthy discussion of the text, structure, and legislative history of the PRA is directed at an argument we simply have not made.[9]

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scant support for the AFL-CIO's argument. In any event, those cases involve various public policy arguments, only a few of which are based in positive law (as here), and only two of which involve public policies relating to the Postal Service (as here). Thus, the Court's decision in this case is unlikely to shed much light on the propriety of those public policy decisions or to encourage additional (unjustified) public policy litigation.

[9] At various points in its discussion of the language, structure, and legislative history of the PRA, respondent suggests (Br. 29, 30-31, 40-42) that the Postal Service is empowered to divest itself by contract

To be sure, toward the close of our opening brief (at 37-38), we suggested that the Postal Service's determination that compliance with an arbitration award would be inconsistent with its statutory obligations is entitled to some deference from the courts. But this suggestion was not based on the Postal Service's status as a public *employer*. Rather, it was based on the Postal Service's status as the principal agency of government charged with administering and interpreting the PRA. This status does not confer upon Postal Service "management special discretion to reject arbitration awards" (Resp. Br. 31). But it does entitle the Postal Service to judicial deference with respect to its interpretations and applications of the substantive provisions of the PRA. See *National Ass'n of Postal Supervisors* v. *USPS*, 602 F.2d 420, 439 (D.C. Cir. 1979); see generally *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Accordingly, the Court, in evaluating

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of its statutory obligations. This suggestion is incorrect. As explained in our opening brief (at 28-31), the language of the PRA does not merely permit the Postal Service to deliver the mails in a prompt, reliable, and efficient manner; it unequivocally commands that the Postal Service do so. Moreover, as also explained in our opening brief (at 31-34), while the language, structure, and legislative history of the PRA indicate that Congress generally intended for the Postal Service to be treated like an ordinary private employer with respect to labor-management relations issues (except where otherwise provided), those same interpretive materials indicate that Congress understood that the Postal Service would have a unique public law mission and that this public law mission would act as an express, external restraint on the private law agreements into which the Postal Service may lawfully enter. Indeed, respondent's acknowledgment (Br. 23) that the Postal Service would not have to comply with an arbitration award ordering the entire Postal Service to shut down in July and August so that letter carriers could have a summer vacation confirms our understanding of the pertinent interpretive materials.

whether Hyde's reinstatement would create a "serious threat" to public policy, should give deference to the Postal Service's judgment that the risk identified by the arbitrator is one the Postal Service is statutorily not permitted to incur. Nothing in the PRA's language, structure, or legislative history suggests that deference of this kind is inappropriate.[10]

In any event, even if the Postal Service's interpretation and applications of its governing mandate were not entitled to judicial deference, the arbitration award requiring Hyde's reinstatement still could not stand. The Court's decision in *Misco* plainly states both that " 'a court may not enforce a collective-bargaining agreement that is contrary to public policy' " and that " 'the question of public policy is ultimately one for resolution by the courts.' " *Misco*, slip op. 12 (quoting *W.R. Grace & Co.* v. *Rubber Workers Local 759*, 461 U.S. at 766). As respondent concedes (Br. 23), the Postal Service's statutory mandate is such a "public policy" and, because of this public policy, some arbitration awards cannot be enforced by the courts. For the reasons set forth above (pages 3-4, *supra*) and in our opening brief (at 21-24, 38-39), the reinstatement order in this case is one such award.

5. Finally, respondent errs in suggesting (Br. 42-44) that this case should be remanded to the arbitrator for further factfinding or, in the alternative, for the fashioning of an alternative remedy. The arbitrator ordered that Hyde be reinstated to his letter carrier position without regard to whether the risk of future misconduct would actually be

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[10] Rather, the statute makes clear that the Postal Service has the power both "to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title" (39 U.S.C. 401(2)), and "to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers" (39 U.S.C. 401(10)).

dissipated during the 60-day medical leave period. The question presented therefore is whether *this* award violates public policy; obviously, no fact-finding concerning Hyde's actual condition at the end of his medical leave is necessary to resolve that question. For similar reasons, no alternative remedy is allowable. If the promise to reinstate Hyde notwithstanding the threat he poses to the security of the mails is inconsistent with public policy, it is unenforceable for all purposes—including for the purpose of a claim for damages. Accord *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. at 78-83. And since the arbitrator did not interpret the contract to allow the Postal Service the option of assigning Hyde to a position where he would not present a threat to the security of the mails (since no such letter carrier position exists), the Court should not ask the arbitrator to reconsider the question; the courts are supposed to respect the finality of such contractual judgments by arbitrators. See *Misco*, slip op. 7-8, 10 n.10.

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions representing approximately fourteen million working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for by the Rules of this Court.

ARGUMENT

Introduction and Summary

This case presents the Court with its second opportunity this Term to clarify the parameters of the "public policy" exception to the usual rule favoring the enforcement of labor arbitration awards. *See also Paperworkers v. Misco*, —— U.S. ——, 56 L.W. 4011 (Dec. 1, 1987). We believe it is helpful to begin by placing the question presented here in the factual and legal context in which that question arises.

A. At issue in this case is an arbitral award rendered pursuant to the "just cause" provision of the parties' collective bargaining agreement. Such provisions have been devised by employers and unions as a way of establishing meaningful limits on an employer's otherwise unfettered prerogative to discharge employees without requiring the parties to negotiate a code of conduct that would satisfactorily anticipate every possible disciplinary case that might arise over a several-year period. What makes "just cause" provisions work as a solution to the issue posed by employee discipline is the existence of the system of grievance-arbitration, under which an employer's discretionary decisions are subject to review by a neutral whose judgment the parties trust. A just cause provision "constitutes a broad charter of responsibility" to the arbitrator to "work out a principled jurisprudence in light of the moral admonition expressed— . . . to see that the cause for discipline is just." The arbitrator in this case conscientiously exercised that authority in concluding that discharging this grievant, whose life had come unraveled as a result of a series of losses and who had demonstrated that he was "putting his life together" was less than just. Pp. 5-10 *infra*.

B. There is no doubt that the Postal Service's promise not to discharge without just cause and to submit just cause determinations to neutral arbitrators for review

does not offend public policy. Although it is of course true, as the Postal Service argues, that the Service has been assigned certain functions by Congress, that assignment does not carry with it any implication that the Postal Service—as distinguished from an arbitrator—must retain the final authority to decide which employees are fit to perform those functions. Moreover, in enacting the Postal Reorganization Act, Congress expressly authorized the Postal Service to enter into collective bargaining agreements providing for binding arbitration of grievances; that was, indeed, one of the principal reasons for the enactment of that law. Pp. 10-12 *infra*.

C. The question here, then, is whether there is a public policy impediment to requiring the Service to abide by its promise (as construed by the arbitrator) to retain in its employ the grievant in the arbitration in question. Under *Misco*, it is the Postal Service's obligation, in order to be relieved of that contractual obligation to show a "clear[]" and "explicit conflict" with a "well defined and dominant" public policy "ascertained by 'reference to the laws and legal precedents.'" Determining whether such a showing has been made requires a careful weighing of the full range of interests that are implicated by the employer's attempt to escape from his promise not to make a discharge without having just cause. Pp. 12-13 *infra*.

D. We do not deny that protecting the security of the mails is a "well-defined" public policy against which the arbitral award here may properly be tested. But other policies are implicated here as well: the general, contract-law policy of holding parties to their agreements; the special labor-relations policy of regulating labor-management relations through a regime of contracts rather than public law; the additional labor-relations policy of resolving disputes through arbitration; and, in the specific context of this case, the policies favoring rehabilitation of criminal offenders and the employment of the handicapped. Pp. 13-19 *infra*.

In our view, a fair analysis of all of the relevant consideration leads to three conclusions.

First, where a legislature or a regulatory body disqualifies particular individuals (or groups of individuals) from certain positions, such a disqualification must take precedence over any contrary labor agreement. The interest in overturning a contract is at its zenith when doing so is necessary to vindicate an express judgment by the government as to who is fit for particular employment; in contrast the interest in contract enforcement is at its nadir when the contract is unlawful *ab initio*.

Second, where the sole ground for overturning a reinstatement award is to vindicate the public policy embodied in a criminal prohibition which the grievant violated, the award should be enforced. Criminal laws provide specific penalties for those who violate the law, and it cannot be assumed, unless the legislature expressly so states, that the public policy embodied in a criminal prohibition requires the permanent disbarment from future employment of all those who commit the proscribed offense.

Third, where an arbitral award is resisted on the ground that the grievant in question, if reinstated, may again fail to perform his duties and may thus interfere with the employer's ability to meet its statutory responsibilities, there is no justification for the courts to second-guess the arbitrator. Because a legislature, in assigning certain functions to a particular employer (like the Postal Service) does not decide in terms which individuals should be trusted to carry out the employer's functions, and because there is no objectively correct answer to that question, the most that any decision maker is capable of is a thoughtful judgment based on a careful evaluation of all the surrounding facts and circumstances. That is precisely what arbitrators are commissioned to provide in rendering just-cause decisions, and the parties

chose an arbitrator because of their confidence in the arbitrator's judgment and mature understanding of the needs of the workplace and of workers. The federal courts are not better able to make these determinations than arbitrators and entrusting federal courts to oversee such judgments absent specific legislative (or administrative) guidance would lead some judges to impose their own brand of industrial justice, and would destabilize the grievance-arbitration system. Pp. 20-27 *infra*.

Where a Grievant Is Not Disqualified From a Particular Job By Virtue of a Statute or Regulation, the Federal Courts Should Not Second-Guess an Arbitrator's Judgment that Depriving the Grievant Of His Job Is Less Than Just.

A. (1) "[A]bsent a collective bargaining agreement," management "hires and fires, pays and promotes, supervises and plans . . . freely except as limited by public law and by the willingness of the employees to work under the particular, unilaterally imposed conditions." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). A principal reason employees choose to engage in collective bargaining is to secure enforceable rules which will "regulate or restrict the exercise" of these otherwise unfettered prerogatives of management. *Id.* As Professor Feller has observed, "collective bargaining . . . is a method by which employees participate in what would otherwise be a system of unilateral management rulemaking and administration." Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 724, 761 (1972).

Job tenure—*viz.*, the circumstances in which an individual's employment may be suspended or terminated by his employer because of the employee's performance or conduct—is a matter that collective bargaining agreements almost universally govern. In theory, the parties to a collective bargaining relationship could negotiate a

detailed set of rules which would fix in advance the agreed-upon penalty for every possible employee transgression that might occur during the term of the agreement. Under such a regime, the sole role for those charged with the responsibility of enforcing the agreement would be to determine the historical facts as, by hypothesis, once the facts were established the penalty would be preordained.

Industrial life is too complex, however, to make such agreements practicable. There are "'too many people, too many problems, too many unforeseeable contingencies,'" *Warrior & Gulf*, *supra*, 363 U.S. at 579, *quoting* Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1498-99 (1950), to enable the parties to write a code of conduct that would satisfactorily anticipate every possibility over a several-year period. And, in any event, the time that would be required to negotiate such an all-encompassing contract and the parties' need for "a fairly concise and readable instrument," *Warrior & Gulf*, *supra*, 363 U.S. at 580, preclude the parties from even attempting to write so detailed a code.[1]

At the same time, the alternative of leaving the propriety of a discharge or other employer disciplinary action to be decided on an *ad hoc* basis as each case arises is equally untenable from the parties' standpoint and even more contrary to the public interest in industrial peace and stability. Such a regime would mean that each decision would be "dependent solely upon the relative strength at any given moment of the contending forces,"

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[1] For an elaboration of these points, *see* Dean Shulman's Oliver Wendell Holmes lecture, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1003-07 (1955), on which this Court heavily relied in *Warrior & Gulf*, and Professor Cox's address to the National Academy of Arbitrators, *Reflections Upon Labor Arbitration*, *supra*, 72 Harv. L. Rev. at 1490-93, on which the *Warrior & Gulf* Court also relied.

and thus would carry with it the potential for never-ending labor unrest. *Id.*

For these reasons, among others, the typical labor agreement addresses the issue of job tenure in "general and flexible terms." Cox, *supra*, 72 Harv. L. Rev. at 1491. Under such an agreement, the employer agrees not to discharge (or discipline) an employee unless the employee engages in conduct ("cause") which makes the penalty of discharge fair and appropriate ("just"). Such "just cause" provisions permit "the exercise of fair and humane judgment and discretion which takes into account all mitigating factors." Shulman, [illegible], 68 Harv. L. Rev. at 1006.

Precisely because it is so "general and flexible," a just cause provision, standing alone, would not go very far towards establishing ascertainable limits on management's otherwise unfettered prerogatives in running the workplace. What makes "just cause" provisions work as a solution to the issue posed by employee discipline is the existence of a system for giving "meaning and content . . . to the . . . agreement," *Warrior & Gulf*, *supra*, 363 U.S. at 581, through the adjudication of complaints that management acted in a manner inconsistent with the agreement. Indeed, providing for such enforcement is "the essence of the . . . collective bargaining agreement" and the agreement's "most significant function." Feller, *supra*, 61 Cal. L. Rev. at 741.

This task of fleshing out and enforcing the collective bargaining agreement is accomplished through the process of grievance arbitration; as Professor Kaden has observed, the institution of grievance arbitration is "the distinctive and valued American contribution to industrial stability." Kaden, *Judges and Arbitrators: Some Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 274 (1980). The existence of arbitral review enables the parties to escape from a Hobson's choice of accepting either an agreement which denies

the employer all discretion in running the workplace or, alternatively, an agreement which leaves the employer with precisely the unfettered discretion collective bargaining is designed to cabin. The arbitration system allows the parties to negotiate an agreement which leaves room for discretionary decisions, secure in the knowledge that those decisions ultimately will be reviewed by a neutral "chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract, as criteria for judgment," *Warrior & Gulf*, *supra*, 363 at 582. The arbitrator's task in this regime is " 'to bring his informed judgment to bear in order to reach a fair solution of [the] problem.' " *Misco*, 56 L.W. at 4015, *quoting Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960).

This is "especially true," *Misco*, *supra*, with respect to the resolution of just-cause cases. "One cannot decide [what] is 'just cause' for a discharge merely by reading the words"; rather, "[m]eaning must be poured into general phrases by the evaluation of a complex of interests." Cox, *supra*, 72 Harv. L. Rev. at 1493. As Dean Kadish put it, a just cause provision "constitutes a broad charter of responsibility to work out a principled jurisprudence in light of the moral admonition expressed . . . to see that the cause for discipline is just." Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, Proceedings of the Seventeeth Annual Meeting of the National Academy of Arbitrators at 147 (1964). Arbitrator Harry Platt, one of the founding fathers of the labor-arbitration system, developed the point further in one of the leading just-cause decisions, explaining that the arbitrator in such cases is assigned the responsibility to

> mak[e] reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fairmined persons as warranting discharge. To be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question, and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community, ought to have done under similar circumstances . . .[*Riley Stoker Corp*, 7 BNA Lab. Arb. 764, 767 (1947)]

In arriving at that judgment, the labor arbitrator will take into account, to a greater or lesser extent, a host of factors including: the employer's interest in penalizing the conduct in question recognizing the gravity of the wrong in terms of its effect on the employer's business and on third persons and the need to deter similar misconduct; the likelihood that the misconduct would recur if the employee were reinstated; prior misconduct by the employee (or the lack of such prior misconduct); any extenuating circumstances which tend to explain (or even justify) the employee's conduct; the penalties meted out to other employees who have engaged in similar misdeeds; and any public interest that may be implicated. *See generally* F. Elkouri & E. Elkouri, *How Arbitration Works*, 670-88 (4th ed. 1985). Balancing all these factors, the arbitrator ultimately renders his best judgment as to whether discharge—the ultimate industrial sanction—is a "just" penalty given whatever "cause" exists. That is the judgment for which the parties bargained and to which they agreed to be bound.

(2) In the instant case, the parties entered into a collective bargaining agreement of the very type just described, *viz.*, an agreement containing a just cause provision and a provision mandating the arbitration of disputes under the agreement. The arbitrator found that the grievant had engaged in misconduct (unlawfully possessing the mail) as a result of a mental illness (compulsive gambling) brought on by a "series of family losses" and that the grievant "is now getting his life together," Pet. App. 19a. The arbitrator then confronted

what has been termed the "real problem" in discharge cases: deciding "whether [there] was sufficient cause" for discharge. Proceedings of the Seventeenth Annual Meeting of the National Academy of Arbitrators, *supra*, p. 149 (remarks of Professor Arthur Ross).

In addressing that question the arbitrator here recognized that he "is not able to foretell what the future prospects of the grievant's rehabilitation may yield" and that there "is the threat of recurrence of misconduct." *Id.* at 22a-23a. At the same time the arbitrator concluded that the "Grievant is salvageable," *id.* at 20a, as his "underlying psychiatric problem . . . did not in itself render the employee unfit for further employment," *id.* at 23a. And in the final analysis the arbitrator was persuaded that " 'to attempt to create an absolutely riskless society is to place an impossible burden on the public,' " and that " 'if we refuse in the name of *safety* to take the small risk, *safety* becomes callousness and indifference,' " *id.* at 23a (emphasis in original). Accordingly, exercising the authority vested in him by the collective bargaining agreement, the arbitrator concluded that discharging the grievant on these facts was less than just and the arbitrator reduced the penalty to an approximately one-year suspension without pay, after which the grievant would be entitled to reinstatement provided that he continued to obtain treatment for his mental disorder.

B. Having agreed to submit discharge grievance issues to arbitration and to be bound by the decisions of the arbitrator, the Postal Service now seeks to escape from that obligation in this case by invoking "public policy." The threshold question raised by the Postal Service's submission in this case is whether the underlying collective bargaining agreement—*viz.*, the promises by the Postal Service not to discharge without just cause and to submit just cause determinations to neutral arbi-

trators for review—offends public policy. Although the Postal Service does not frame its argument in quite those terms, there are occasional statements in the Service's brief questioning the validity of the arbitration provision (although not the just cause provision) of the agreement on the ground that the Service is not "free . . . to divest itself of the discretion necessary to carry out its statutory mandate".[2] The Postal Service's implicit challenge to binding arbitration of this grievance is wholly without merit.

To begin with, as a matter of simple logic, the fact that Congress has assigned certain functions (mail delivery) to the Postal Service does not carry with it any implication that the Postal Service must retain the final authority to decide which employees are fit to perform those duties. At least so long as the substantive standard applied by the neutral in rendering his decisions recognizes and accords with the statutory responsibilities of the Postal Service, assigning to a neutral the authority to decide who is fit to deliver the mail is entirely consistent with the Postal Service's responsibility for mail delivery. And, as noted, not even the Postal Service suggests that the "just cause" rule on its face sets a substantive standard that is inconsistent with accomplishing the Postal Service's responsibilities.

We do not pursue the point further, however, because there is an even more definitive response to the Postal Service's argument: in enacting the Postal Reorganization Act of 1970, 39 U.S.C. § 101 et seq ("PRA"), Congress expressly authorized the Service to enter into collective bargaining agreements providing for "binding third-party arbitration" of "grievances . . . arising under the agreement." 39 U.S.C. § 1206(b).

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[2] *See also* Pet. Br. at 30 ("under sovereignty and non-delegation principles, the public employer is not allowed to delegate control over its legal powers and obligations to nongovernmental groups (such as arbitrators) through the bargaining process").

Furthermore, as the respondent National Association of Letter Carriers ("NALC") shows in its brief, the legislative history of the PRA demonstrates that the Act was in large part animated by legislative (and executive) concern over the sorry state of labor relations in the Post Office prior to 1970, and a legislative (and executive) determination that the way to improve those relations was "to bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector." H.R. Rep. No. 1104, 91st Cong. 2d Sess. 13-14 (1970). The legislative materials are, in particular, replete with references to the desirability of extending to postal employees the benefits of the grievance-arbitration system that exists in the private sector.

Given the judgments Congress made in enacting the PRA, there is simply no room for the argument that the Postal Service's agreement to submit discharge grievances to final and binding arbitration under a just-cause standard in and of itself violates public policy. The only serious question is whether there is a public policy impediment to requiring the Service to abide by its promise (as construed by the arbitrator) to retain in its employ the grievant in the arbitration in question here. That question must be answered by applying the teachings of *Misco* and its predecessor, *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983).

C. In *Misco* the Court observed that a "court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." 56 L.W. at 4015. That common-law doctrine, as it has evolved in this Court, "does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy." *Id.* Rather, the only "public policies" that may be considered in this context are those that are

"'well defined and dominant'" and are "ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Misco*, 56 L.W. at 4015, and *W.R. Grace*, 461 U.S. at 766, both *quoting Muschany v. United States*, 324 U.S. 49, 66 (1945). And even where such a policy is implicated, the arbitral award is not to be overturned unless the "award creates an [] *explicit conflict*" with that policy; "the *violation* of such a policy must be *clearly shown* if an award is not to be enforced." 56 L.W. at 4015 (emphasis added).[3]

Neither *Misco* nor *W.R. Grace* provide further guidance for determining when an arbitral award "explicit[ly]" or "clearly" conflicts with public policy. But under the common law of contracts it is "well established" that in deciding whether "a promise is unenforceable" on public policy grounds, "the interest in . . . enforcement" must be weighed against the "public policy harmed by enforcement." *Town of Newton v. Rumery*, —— U.S. ——, 55 L.W. 4304, 4305 (March 9, 1987). To determine whether the contract here, as interpreted by the arbitrator, is unenforceable thus requires an exploration of the full range of interests that are implicated by the employer's attempt to escape from his promise not to discharge without just cause.[4]

D. (1) The Postal Service relies on the "public policy demanding the security of the mails," Pet.Br. at 17, which policy, the Service maintains, would be compromised

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[3] *Cf. Steele v. Drummond*, 275 U.S. 199, 205-06 (1927) (public policy doctrine applies "only in clear cases" where it is "clearly established that public policy would be violated").

[4] *See also Restatement (Second) of Contracts* § 1781(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

by the reinstatement of an individual who in the past failed to deliver the mails and as to whom there may be some risk of a recurrence of this misconduct. We readily concede, as does the respondent Union, that protecting the "security of the mails" is a public policy that can be derived from "laws and legal precedents" rather than merely from "considerations of supposed public interests" and thus that an arbitral award may properly be tested against this policy.[5] We likewise concede that reinstating an individual who in the past unlawfuly retained (rather than delivered) mail does subject the public policy favoring the security of the mails to some degree of risk. But relieving the Postal Service from what the arbitrator found to be its promise not to discharge the grievant would threaten important public policies as well.

(2) a. Whenever a party seeks permission to breach a contract that party has made, one countervailing policy is *ipso facto* implicated: the policy underlying the law of contracts that holds parties to their agreements. As the Court has stated, "it is to be remembered . . . that public policy requires that competent persons 'shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred and shall be enforced by courts of justice.'" *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab*, 276 U.S. 518, 528 (1928). *See also Baltimore & O.S.R.Co. v. Voigt*, 176 U.S. 498, 505 (1900).

This policy applies with full force in the labor relations context. In enacting the Labor Management Relations Act of 1947, Congress amended the National Labor Relations Act to add a provision, LMRA § 301, 29 U.S.C. § 185, whose very purpose is to assure that "collective

[5] Thus, for example, if an arbitrator were, hypothetically to enter an award which granted postal employees the right to keep, rather than deliver mail addressed to certain parts of the country or sent in certain seasons, we do not doubt that such an award could fairly be set aside as contrary to public policy.

agreements [are] mutually binding on both parties to the contract." S.Rep. 105, 80th Cong., 1st Sess. 15 (1947). And the PRA contains a section directly analogous to LMRA § 301 providing for enforcement of collective bargaining agreements between the Postal Service and postal unions. 39 U.S.C. § 1208(b).

b. In the labor-relations context there is a second and independent public interest in contract enforcement: the federal interest in regulating labor-management relations through a regime of contracts rather than public law.

Outside of the field of labor relations, "[w]hen most parties enter into contractual relationships they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties." *Warrior & Gulf*, 363 U.S. at 580. While the law enforces those agreements that are made, it is a matter of indifference to the law whether an agreement is made. This is decidedly not the case with respect to labor relations and labor agreements; the NLRA was enacted for the stated purpose of "*encourag[ing]* the practice and procedure of collective bargaining," NLRA § 1, 29 U.S.C. 151, and the Act imposes on employers and unions a reciprocal obligation to bargain with each other in good faith, NLRA § 8(a)(5), (b)(3), 29 U.S.C. § 158(a)(5), (b)(3).[6]

In enacting the NLRA, Congress concluded, as the preamble to the Act states, 29 U.S.C. § 151, that through collective bargaining workers could redress the "inequality of bargaining power" and resulting "depress[ed] wage rates" that exist where employees confront their

[6] These provisions of the NLRA are applicable to the Postal Service and postal unions by virtue of the PRA, *see* 39 U.S.C. § 1209(a); indeed, as previously noted, a major purpose of the PRA was precisely to achieve that result. Thus, the aspects of the national labor policy discussed in text are directly relevant here.

employers individually and could secure terms and conditions of employment that more closely reflect the employees' own desires. Congress further concluded that "such an approach . . . promoted the overall design of achieving industrial peace." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960). As this Court explained long ago:

> The Act contemplates the making of contracts with labor organizations. That is the manifest object in providing for collective bargaining. . . . The fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. . . . [*Edison Co. v. Labor Board*, 305 U.S. 197, 236-37 (1938)] [7]

Thus, the successful negotiation, and the continued observance, of collective bargaining agreement both serve to vindicate the national labor policy. And when an employer seeks to have the government step in and overturn or modify the parties' agreement, a core aspect of that policy is threatened.

Indeed, to a large extent, the point of the collective bargaining system is to allow private decision-making to

[7] *See also, e.g., Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45 (1937) ("The theory of the Act is that free opportunity for negotiations with accredited representatives of employees is likely to promote industrial peace"); *Labor Board v. American Ins. Co.*, 343 U.S. 395, 401 ("The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements"); *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) ("The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace"); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("The basic theme of the Act was that through collective bargaining, the passions, arguments, and struggles of prior years would be channeled into constructive open discussions leading, it was hoped, to mutual agreement").

substitute for public decision-making in determining terms and conditions of employment. "The goal of federal labor policy . . . is . . . to encourage the employer and the representatives of the employees to establish through collective negotiation their own charter for the ordering of industrial relations," *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959); "the fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract," *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 108. Thus "[i]f the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1980). The court's supervisory role is limited to those instances in which the parties have "contract[ed] for what is illegal under state [or federal] law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985), as "Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).[8]

c. Where, as here, an employer seeks to escape from an arbitrator's construction of a collective bargaining agreement—and to that extent escape from the employer's promise to abide by a final and binding arbitration decision—there is yet another public interest that is implicated: "the strong federal policy favoring arbitration

[8] *See also Labor Board v. Insurance Agents, supra*, 361 U.S. at 488 ("Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulative the substanve solution of their differences"); *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982) ("when neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract").

of labor disputes," *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 382 (1974). That policy is stated in LMRA § 203(d), 29 U.S.C. § 173(d) which provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." And, as this Court has recognized, the policy of § 203(d) "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play"; arbitration "is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-67 (1960). It follows that there is a special public interest in enforcing collectively-bargained promises to resolve disputes under the contract by final and binding arbitration.

d. All of the foregoing considerations apply across the board. Discharge cases such as this one (or *Misco*), are distinctive because such cases implicate an additional consideration. As previously noted, it is the employer's basic claim here that the fact that the employee suffered from a mental illness that caused him to commit a crime (unlawful delay of the mails), requires that the arbitrator's reinstatement order be overturned. But the factors on which the Postal Services relies are double-edged; while there are in some circumstances well-defined public policies against employing in certain positions individuals who have committed (or will) commit specified wrongs, there are also weighty public policies that look the other way.

Specifically, there is a public policy which favors rehabilitating criminal offenders and enabling such individuals to resume a place in the society; that policy, which is embedded in the laws governing the punishment of convicted criminals, *e.g.*, 18 U.S.C. §§ 3553(a)(2), 4081,

4122, counsels *against* disqualifying an individual for further employment solely because of a prior criminal act. In addition, there is a public policy favoring the employment of the handicapped—including those suffering from mental illnesses—in federal jobs; that policy—which is stated in § 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. § 791(b), and in implementing regulations promulgated by the Equal Employment Opportunities Commission, 29 CFR § 1613.703, and by the Postal Service itself, 39 CFR § 225.1(d)—pushes in favor of retaining mentally ill individuals in federal employ, at least where just cause for discharge is deemed to be lacking.

3. The ultimate task for the Court is to balance these competing considerations in order to determine in what circumstances an arbitration award interpreting a collective-bargaining agreement to prohibit a discharge so "clearly" and "explicitly" violates a "well-defined" public policy as to warrant overturning the award. The foregoing analysis leads to three conclusions.

a. Where the state prohibits a particular employer or groups of employers from employing in certain positions persons convicted of specified offenses (or suffering from specified disabilities), such governmental action should be held to supercede any contrary employment agreement. The government undeniably has the power to establish such disqualifications, either by statute or by regulation and such rules are not uncommon especially with respect to employment by the government and employment in highly regulated industries.[9]

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[9] For example, there are at least eight sections in Title 18 of the United States Code which prohibit certain conduct by government employees and which provide for disqualification from government employment as one of the penalties for those who commit such offenses. *See* 18 U.S.C. §§ 1901 (carrying on trade or business in United States funds), 1905, 1906, 1907, 1908 (disclosure of confidential information), 1912 (collecting unauthorized fee), 1913

The enactment of such a rule represents as clear and explicit a statement as possible of a judgment by the state that public policy precludes the employment of particular individuals in particular jobs. The state may reach such a judgment in order to add to the sanctions for certain criminal conduct. Or the state may enact a disqualification because the state concludes that employing the disqualified persons in particular jobs would pose too great a risk to the public safety or some other public interest. And, in our society, the making of such policy judgments is a quintessentially legislative function.

Whatever the reasons underlying such a disqualification, the public law necessarily takes precedence over any private agreement. The general public interest in requiring parties to contracts to live up to their promises has never been understood to extend to promises the parties were not free to make in the first instance. A law which prohibits the employment of certain classes of persons in certain positions would, by definition, establish the limits of the public policies favoring criminal rehabilitation and the protecton of the mentally handicapped. And there is

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(lobbying with appropriated funds), 2071 (concealment or destruction of records), 2385 (advocating overthrow of the government). In addition, Title 5 of the U.S. Code provides that persons who have engaged in certain conduct or been convicted of certain offenses are ineligible for government employment. *See* 5 U.S.C. §§ 7311, 7313; *see also Postal Workers v. Postal Service*, 582 F.2d 1280 (9th Cir. 1982).

In addition to these disqualifications from public employment, federal law also contains a number of disqualifications from particular types of *private* employment. *See, e.g.*, 12 U.S.C. § 1730(a)(i) (disqualifications from serving as a bank officer); 15 U.S.C. § 78o(b)(4) (disqualifications for securities broker-dealers) 29 U.S.C. § 504 (disqualifications from serving as an officer or employee of (or consultant to) a labor organization); 29 U.S.C. § 1111 (disqualification from employment by a pension or welfare plan).

There are also a number of types of occupations for which a federal *license* is required, and as to which a federal regulatory authority is empowered to establish disqualifications. *See, e.g.*, 49 U.S.C. § 1422 (airline pilots).

nothing in the national labor policy that warrants enforcing unlawful agreements; to the contrary, as already noted labor policy does *not* privilege employers and unions to enter into agreements, which "disregard other laws," *Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965); *see also* p. 17 *supra*. Thus, none of the interests in contract enforcement previously discussed even support—let alone compel—the enforcement of a promise to employ an individual in a specified position where public law squarely forbids such employment.

b. At the opposite extreme, it seems to us equally clear that where the sole ground an employer advances to overturn an arbitration award directing reinstatement of a grievant is the need to vindicate the public policy embodied in a criminal prohibition which the grievant has violated, the employer's argument must fail and the arbitrator's award must be upheld.[10] To be sure, any time a legislature criminalizes certain conduct the legislature expresses a public policy against the commission of such acts. But the legislature in enacting such a law also provides the penalties for those who violate the law, and it cannot be assumed, unless the legislature expressly so states, that the public policy embodied in the criminal prohibition requires in addition to the stated penalty the permanent disbarment from future employment of all persons who commit the offense. Then Circuit Judge Marshall persuasively refuted that argument in his opinion for the Second Circuit in *Electrical Workers v. Otis Elevator Co.*, *supra*, 314 F.2d at 29, refusing to set aside

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[10] The Postal Service does not argue in terms that the arbitral award should be overturned here for failing to provide a sufficient penalty for grievant's past offense. But the Postal Service comes quite close to so arguing in contending that the award should be overturned because of its (alleged) deleterious effect on the Services's "'ability to impress the seriousness of the Postal Service's mission upon its workers'" and on "public confidence in the Postal Service's dedication to its statutorily assigned task." Pet. Br. 22, *quoting* Pet. App. 30a-31a (Rehnquist, C.J., in Chambers).

an award directing the reinstatement of one convicted for gambling on company premises:

> Of course, there is a public policy which condemns gambling by an employee on the premises of the employer; it is a policy expressed by the section of the New York Penal Law which [the grievant] was convicted of violating. But that policy has been vindicated in the present case in the very manner that the State of New York contemplated by a criminal conviction and the judicial imposition of a penalty. . . . There is no federal policy that requires greater vindication of the public condemnation of gambling than this. The law is not that draconian. To enforce the arbitrator's award in these circumstances cannot fairly be looked upon as judicial condonation of [the grievant's] offense.
>
> Moreover, in light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of crime, there can hardly be a public policy that a man who has been convicted, fined, and subjected to serious disciplinary measures, can never be ordered reinstated to his former employment, particularly when the conviction for his first offense and when the arbitration found no indication that reinstatement would result in repetition of the illegal activity.

c. The harder cases, of course, are not those covered by either of the two rules stated above; the harder cases involve claims, like the one made here, that if a particular individual is reinstated, he may again engage in misconduct (here nondelivery of the mails) of a type that would interfere with the employer's ability to comply with its legal duties (here, the duty to deliver the mails). In such cases the employer invites the federal courts to decide that the risk of future misconduct posed by a particular employee warrants relieving the employer from his promise (as authoritatively construed by the arbitrator) to retain that individual in his employ. That is

precisely the argument the Postal Service advances in this case.

In order for such an argument to be seriously entertained by the courts, it is necessary, at a minimum, that the arbitrator has made factual findings establishing the factual predicate for the argument, *viz.*, that reinstatement will, in fact, result in an increased risk of misconduct. This much is established by *Misco*. There the Court reasoned that even if, as the employer in that case argued, there were a "dominant public policy"—as distinguished from a common-sense interest—against the employment of one who is prone to report to work while under the influence of marijuana, overturning the arbitral award in that case still would have been improper, because the arbitrator had found nothing more than a single instance in which the grievant had possessed marijuana on company property, and to

> conclude from th[at] fact . . . that [the grievant] had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in fact-finding about [grievant's] use of drugs and his amenability to discipline, *a task that exceeds the authority of a court asked to overturn an arbitration award*. The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [grievant] and be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task. If additional facts were to be found, the arbitrator should find them . . . [56 L.W. at 4016]

In this case, however, the arbitrator, after acknowledging that he could not "foretell what the future prospects of the grievant's rehabilitation may yield," did go on to state that if grievant were reinstated there would be a "threat of recurrence of misconduct." P. 10 *supra*. The question thus posed is whether, where the arbitrator finds

such a risk and also finds that under the circumstances the risk is not sufficient to make a discharge "just", there is a "clear" or "explicit" enough violation of public policy to justify overturning the arbitral award. When all the relevant considerations are taken into account, we submit that the answer to that question must be "no."

To begin with, it is simply not true that in imposing particular duties on an employer (such as the duty to deliver the mail), the legislature makes its own judgment as to which individuals are (or are not) fit to carry out those duties. There is, after all, some degree of risk that any individual—even one with an unblemished record of past service—will fail to perform his responsibilities properly in the future. And while, as we have seen, legislatures and regulatory bodies are fully competent to decide that individuals who have committed certain wrongs or who suffer from certain disabilities pose too great a risk to be employed in certain capacities, no such decision can be derived from a generalized law entrusting certain responsibilities to a particular employer or group of employers. Rather, such a law leaves employment decision to be made on a case-by-case basis. Any claim that an award directing reinstatement of a particular individual to a particular job "clearly conflicts" with a law vesting certain functions in the employer therefore begins as unlikely at best.

Moreover, precisely because a generalized law of the type on which the Postal Service relies here does *not* determine, in terms, which individuals should be trusted to carry out the employer's functions, the interest in leaving undisturbed resolutions arrived at through the process of collective bargaining is especially strong. There is *no objectively "correct" answer* to the question of whether an employee—particularly one, like the grievant here, who had a long history of serving his employer well—who has engaged in some act of misconduct can no longer be trusted to perform the employer's work. Not even the

most sophisticated social scientist can predict whether a particular individual will engage in misconduct in the future; to the contrary, one of the principal lessons social science teaches is the "extreme[] difficult[y]" of making such predictions. Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 Harv. L. Rev. 511, 515 n.22 (1982).[11] In these circumstances, the most any decision-maker is capable of is a thoughtful judgment based on a careful evaluation of all the surrounding facts and circumstances.

As we have seen, that is precisely what arbitrators attempt to do in "just cause" cases. Arbitrators are chosen, moreover, because both parties have confidence in their judgment and, more particularly, in their sensitivity to the needs of the workplace and its workers. *See Warrior & Gulf*, 363 U.S. at 582. And the fundamental premise of the national labor policy is that decisions of this type are best made through the process of collective bargaining, including grievance-arbitration.

There is no reason to believe that the quality of decision-making—or any other cognizable public interest—would be appreciably furthered by empowering federal judges to second guess the decisions made by arbitrators on such delicate matters in circumstances in which the legislature has not chosen to adopt a rule disqualifying individuals in the grievant's situation from future employment. Rather, the most likely result of vesting the courts with the power to use generalized statutes like the PRA to overturn arbitral awards would be that "astride the 'unruly horse' of public policy," *Black v. Cutter Laboratories*, 43 Cal. 2d 788, 278 P.2d 905, 919 (1955)

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[11] For example, efforts to predict the likelihood of convicts committing violent acts on their release "were almost uniformly discouraging, with rates of 'false positive'—individuals who were mistakenly classified as dangerous—ranging from between fifty-four and ninety-nine percent." Note, *supra*, 96 Harv. L. Rev. at 515 & n.21.

(Traynor, J., dissenting), some judges would attempt to impose their own brand of industrial justice on the parties to just-cause agreements.[12]

The danger of permitting courts to second-guess arbitral determinations that a particular employee is fit to return to work is not simply—or even primarily—that such a power would be regularly abused by the courts. The primary threat to the arbitration system that would be posed by such a formless power is that it would invite frequent litigation challenging arbitration award. Under such a regime there would be countless reinstatement awards which could be said to raise a public policy issue, and where the outcome of a challenge based on that issue could not be predicted by the parties with any degree of certainty. In these circumstances, there would be a strong temptation for the employer to resist the award and to shop for a favorable judicial decision. And it is doubtful

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[12] There is evidence in the post-*W.R. Grace* decisions of the lower federal courts to suggest that that is precisely what the courts have been doing.

For example, in *Postal Service v. Postal Workers*, 736 F.2d 822 (1st Cir. 1984)—a case on which the Postal Service relies on this case, *see* Pet. Br. at 22-23—the court refused to enforce an award providing for the reinstatement of an employee who was discharged for embezzling a small amount of money from the Postal Service. The arbitrator entered that award after finding that: the grievant had worked for the Postal Service for seven years without committing any misdeed; he had been under "unusual financial pressures" at the time of the embezzlement; and he intended to repay the Postal Service and, indeed, had retained records for that very purpose and had made some repayments. Moreover, the arbitrator had ordered the grievant reinstated (following a long disciplinary suspension) to a position *in which he would not be handling money.*

See also, e.g., S.D. Warren Co. v. Paperworkers, 815 F.2d 178 (1st Cir. 1987), *vacated and remanded*, —— U.S. ——, 56 L.W. 3414 (Dec. 14, 1987); *Auto Workers v. Keystone Consolidated Industries, Inc.*, 782 F.2d 1400 (7th Cir. 1986), *vacated*, —— F.2d —— (7th Cir. 1987); *Chicago Truck Drivers v. Denton Cartage Co.*, 649 F.Supp. 1009 (N.D. Ill. 1986).

at best whether an arbitral system whose results are so frequently subject to challenge can long survive.[13]

In sum, when *all* of the relevant considerations are balanced, it cannot be said that there is a "clear" and "explicit" conflict between a law imposing certain duties on an employer and an arbitral award holding an employer bound to retain in his employ a particular individual merely because the arbitrator found that there was some risk that, if reinstated, the employee might fail to carry out the employer's statutory responsibilities.

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[13] The post-*W.R. Grace* experience demonstrates the creative lengths to which employers—including the Postal Service—will go in challenging arbitral awards on public policy grounds.

For example, in *Postal Service v. Letter Carriers*, 789 F.2d 18 (D.C. Cir. 1985), the Service declined to comply with an award requiring payment of regular wages to an employee called for jury duty, claiming that such an award violated public policy.

In *Northwest Airlines v. Air Line Pilots Association*, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548, the employer is challenging an arbitration award directing the reinstatement of a pilot who had been discharged on alcohol-related grounds, even though the pilot in question has been found to have recovered from a case of alcoholism, and even though the *Federal Aviation Administration* has granted the pilot a full and unconditional pilot's license.

See also, e.g., Bevles Co. v. Teamsters Local 968, 791 F.2d 1391 (9th Cir. 1986) (challenge to award directing reinstatement of undocumented aliens); *Hilton International Co. v. Union de Trabajadores*, 600 F.Supp. 1446 (D.P.R. 1985) (challenge to award ordering reinstatement of employee discharged for pressing for higher tips); *Steelworkers v. National Can Corp.*, No. 86-C-7390 (N.D. Ill., June 11, 1987) (challenge to award ordering company to reinstate an employee returning from disability leave to employee's old job).

CONCLUSION

For the foregoing reasons, and those stated in the brief of respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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OCTOBER TERM, 1987

UNITED STATES POSTAL SERVICE,

Petitioner,

—v.—

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL COUNCIL ON COMPULSIVE GAMBLING, INC. AS AMICUS CURIAE

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UNITED STATES POSTAL SERVICE,

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NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL COUNCIL ON COMPULSIVE GAMBLING, INC. AS AMICUS CURIAE

The National Council on Compulsive Gambling, Inc. submits this brief amicus curiae in support of respondent National Association of Letter Carriers, AFL-CIO.[1/] The National Council on Compulsive Gambling,

[1/] This brief is submitted on consent of all parties. Letters granting this consent have been filed with the Clerk of this Court.

Inc. ("National Council") is a New York non-profit corporation established to combat the disease of pathological, or compulsive, gambling. Toward that end, the National Council is dedicated to the dissemination of information recognizing compulsive gambling as a treatable disorder. The National Council publishes semi-annually the Journal of Gambling Behavior, a journal devoted to the understanding of pathological gambling. It responds to media, courts and industry, providing information on compulsive gambling. The National Council promotes treatment through Gamblers Anonymous and disseminates information for Gamblers Anonymous without threatening the anonymity of Gamblers Anonymous members. Its relationship with Gamblers Anonymous is similar to that shared by the National Council on Alcoholism with Alcoholics Anonymous.

Our aim here is to assist the Court in understanding the medical nature of, and

available treatment for, pathological gambling.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Council submits this brief amicus curiae in support of respondent's position that judicial intervention vacating the arbitrator's award is not warranted here.

The arbitrator's award rests on two conclusions: (1) that Mr. Hyde's misconduct was the product of his compulsive gambling disorder; and (2) that Mr. Hyde could be rehabilitated through abstention from gambling, psychological counseling, participation in Gamblers' Anonymous, and reinstatement to employment. Both conclusions are supported by studies of compulsive gambling. The award of reinstatement reflects an accurate understanding of the disease of compulsive gambling and its treatment; it should be enforced.

ARGUMENT

THE ARBITRATOR'S AWARD REFLECTS AN ACCURATE UNDERSTANDING OF THE DISEASE OF COMPULSIVE GAMBLING AND SHOULD BE ENFORCED

The Postal Service's argument that Mr. Hyde poses an undue risk to the security of the mails focuses entirely on misconduct which occurred during the worst phase of Mr. Hyde's compulsive gambling disorder. At the same time, the Postal Service dismisses Mr. Hyde's continuing participation in Gamblers' Anonymous and his abstention from gambling as insufficient evidence of rehabilitation. This argument portrays a fundamentally flawed view of the nature and treatment of compulsive gambling which should not now be accepted by the Court.

1. Early estimates in 1974 indicated that 61 percent of American adults gambled. Lesieur & Custer, "Pathological Gambling: Roots, Phases and Treatment", ANNALS, AAPSS (July 1984) pp. 146, 147, citing the Commission on the Review of the

National Policy toward Gambling, Gambling in America (Wash., D.C., Gov't. Printing Office 1976), p. 3.[2/] With increased legalization of gambling, this number has been projected to be close to 80 percent. Lesieur, Understanding Compulsive Gambling (Hazelden Foundation 1986), p. 1. Of this percentage, approximately 1 to 9 million persons have been labeled "probable compulsive gamblers." Politzer et al., "Report on the Cost-Benefit/Effectiveness of Treatment at the Johns Hopkins Center for Pathological Gambling", Journal of Gambling Behavior, Vol. 1 (2) (Human Sciences Press, Fall/-Winter 1985), pp. 131, 132.

As the arbitrator noted, there has been an expanding occupational approach towards the treatment of compulsive gambling as a medical disorder. In 1980, the

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[2/] For the Court's convenience, 10 copies of each article cited herein have been lodged with the Clerk of the Court. Copies of each article have also been served along with this Brief upon both parties.

American Psychiatric Association recognized pathological gambling as a "disorder of impulse control". Diagnostic and Statistical Manual of Mental Disorders, 312.31 (American Psychiatric Association, 3d Ed., 1980).[3/] Since 1980, efforts have been made to educate the public both as to the medical nature of this disorder and the avenues of treatment and rehabilitation available.

The Postal Service, in alleging that Mr. Hyde has once been derelict in his duty and cannot now be trusted, fails most

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[3/] The revised criteria, four of which are necessary for a diagnosis of pathological gambling, are: (1) frequent preoccupation with gambling; (2) gambling more and more often than intended (impaired control); (3) increasing size and frequency of bets; (4) restless or irritable if cannot gamble; (5) numerous efforts to cut down on gambling; (6) gambling when expected to fulfill other obligations (social, educational, job); (7) sacrificing other important life activities in order to gamble; (8) gambling despite mounting problems (financial or other); (9) chasing losses, that is, repeatedly gambling in an effort to win back previous losses. Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R).

importantly to recognize the medical nature of the disorder which led to his prior dereliction of duty. The unlawful delaying of the mail during 1983-1984 was conduct symptomatic of a compulsive gambler.

Throughout his gambling career, the compulsive gambler will progress through three identifiable stages: winning, losing and desperation, the latter of which is characterized by irrational and irritable behavior. During the desperation phase, the gambler becomes obsessed with paying back loans and getting even; gambling becomes a full-time endeavor. At work, the job becomes a disaster area as the gambler's mind is off work. The job is exploited for what it can offer by way of relieving pressure: if self-employed, the business is drained; if employed where embezzlement is possible, embezzlement becomes highly likely. At this stage, gamblers become irrational, restless, irritable, and experience lost sleep, missed loan payments,

criminal activity, lost friends, deep bouts of depression and suicidal thoughts. See Lesieur & Custer, "Pathological Gambling", pp. 152-153; Lesieur, Understanding Compulsive Gambling, pp. 3-8.

2. The fact that the arbitrator refused to make a clinical judgment on rehabilitation and expressed some reservation as to Mr. Hyde's future prospects does not warrant the conclusion that rehabilitation would not be successful. Rather, the arbitrator's comments correctly recognize that recovery for compulsive gamblers, as for alcoholics, is a lifetime commitment.

Treatment for compulsive gamblers consists primarily of two methods: Gamblers Anonymous and professional counseling. Most professional counseling services utilize Gamblers Anonymous as an adjunct. Increased attention has been given to short-term intensive in-patient programs, and more and more states are sponsoring centers for such

programs.[4/] At present there are no comprehensive studies concerning the effectiveness of the varying types of treatment, in part due to the recency of public acceptance of compulsive gambling as a treatable, psychological disorder. However, those studies that have been done indicate that compulsive gambling is in fact a treatable disorder. A Johns Hopkins study on its short-term in-patient program concludes that "pathological gambling may not only rank among the most expensive illnesses afflicting society, but also is the least expensive to treat and the most 'curable' when treated." Politzer et al., "Report on Cost-Benefit", Journal of

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4/ In 1978, Maryland established the Johns Hopkins Center for Pathological Gambling, the first pathological gambling t----ent center in the United States open to e public. Politzer et al., "Cost-Benefit" at p. 132.

Gambling Behavior, at p. 141.[5/]

Similarly, a study of 66 patients in a short-term in-patient gambling treatment program at the Cleveland Veterans Administration Medical Center showed a 50% rate of abstinence for a full six months after treatment, a rate which compares favorably with reported abstinence for alcohol and drug abuse, where six-month abstinence rates for similar populations range from 23% to 44%. The Cleveland study concluded:

> A sizeable proportion of seriously impaired pathological gamblers were able to maintain abstinence and general behavioral improvement after an intensive short-term, structural treatment program . . . . These results clearly support the proposition that pathological gambling is a treatable disorder.

[5/] The Johns Hopkins study found a compulsive gambling treatment benefit-to-cost ratio of of 20:1, compared to an alcoholism treatment benefit-to-cost ratio of 2:1 after one year of treatment. Politzer et al., "Cost-Benefit" at p. 141.

Taber et al., "Follow-up of Pathological Gamblers After Treatment", Am. J. Psychiatry 144:6 (June 1987), pp. 757, 760.

Perhaps most significantly, researchers have found that personality traits associated with compulsive gambling can, during rehabilitation, strengthen the reformed gambler's capacity for successful employment:

> The gamblers' strengths make rehabilitation efforts much easier than initially expected. One can capitalize on their high intelligence, industriousness, high energy level, competitiveness, and desire for independence. These traits are particularly effective in reestablishing vocational activities. Work becomes a time- and energy-consuming activity that substitutes significantly for their drive to gamble. It is not uncommon for them to secure two or three jobs.

Lesieur & Custer, "Pathological Gambling", at p. 155.

The National Council is particularly disturbed by the Postal Service's contention that Mr. Hyde's continuing participation in Gamblers

Anonymous and his abstention from gambling "[w]hile commendable ... do not establish that Mr. Hyde has successfully overcome the problems that led him criminally to delay and jeopardize the mail or that there is not an unacceptably high risk that he would do so again." (Pet. Br. 39, n.9). The implicit message of this argument is clear: compulsive gamblers are so dangerous that their continued employment violates public policy, even when the individual is obtaining treatment and has stopped gambling. Acceptance of such reasoning by this Court would represent a grievous setback to the efforts by the National Council to promote the rehabilitation of compulsive gamblers through treatment and employment. We strongly doubt that the Postal Service would express similar sentiments toward a sixteen-year veteran employee suffering from alcoholism who has entered into a treatment program and stopped

drinking. To the contrary, the Postal Service maintains a policy of promoting the rehabilitation of employees afflicted by alcoholism and drug abuse. See Collective Bargaining Agreement, Article 35, "Employee Assistance Program."[6/]

The National Council urges this Court to accept the arbitrator's enlightened understanding of the disease of compulsive gambling and to enforce his award as consistent with public policy.

[6/] The Postal Service has recently reported that in fiscal year 1987, 12,600 employees were participating in the Employee Assistance Program. Comprehensive Statement On Postal Operations, 10 (USPS, 1987).

CONCLUSION

For the reasons set forth herein and in the brief for the respondent National Association of Letter Carriers, AFL-CIO, the judgment of the court of appeals should be affirmed.

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